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No. 09-86

Supreme Court, U.S.
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In The

Supreme Court of the United States

MICHAEL H. BOULWARE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Boulware v. United States*, 128 S. Ct. 1168 (2008), this Court rejected the Ninth Circuit's "contemporaneous intent" gloss on the return of capital rule under 26 U.S.C. §§ 301 and 316, declined to determine whether petitioner Boulware had made an adequate proffer on the "with respect to its stock" limitation in § 301(a), and remanded for "further proceedings consistent with this Court's opinion." On remand, the court of appeals held (1) on the "with respect to its stock" issue, that Boulware "failed to establish in the record before the district court that he only could have received the distribution in his capacity as a shareholder"; and (2) that Boulware had failed to establish sufficient "basis" in his stock.

The questions presented are:

1. Did the court of appeals require Boulware to meet an impermissible procedural and substantive burden on the "with respect to its stock" component of the return of capital rule?

2. Did the court of appeals disregard this Court's mandate by considering the basis issue that the government expressly declined to raise before this Court and that this Court treated as undisputed?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the United States Court of Appeals for the Ninth Circuit were Petitioner Michael Boulware and Respondent United States.

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PETITION FOR A WRIT OF CERTIORARI

Michael Boulware petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1-16) is reported at 558 F.3d 971. The court of appeals' order denying Boulware's petition for rehearing (App. 88) is unreported. The district court's oral rulings (App. 74-83) are unreported. The court of appeals' rulings on Boulware's prior appeals (App. 17-32 and App. 33-73) are reported at 470 F.3d 931 and 384 F.3d 794. This Court's prior decision in this case is reported at 128 S. Ct. 1168.

JURISDICTION

The court of appeals entered judgment on March 9, 2009. App. 1. The court denied a timely petition for rehearing on April 22, 2009. App. 88. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 301 of Title 26, United States Code, provides in relevant part:

> (a) In general. Except as otherwise provided in this chapter, a distribution

of property (as defined in section 317(a)) made by a corporation to a shareholder with respect to its stock shall be treated in the manner provided in subsection (c).

. . . .

(c) Amount taxable. In the case of a distribution to which subsection (a) applies--

(1) Amount constituting dividend. That portion of the distribution which is a dividend (as defined in section 316) shall be included in gross income.

(2) Amount applied against basis. That portion of the distribution which is not a dividend shall be applied against and reduce the adjusted basis of the stock.

(3) Amount in excess of basis.

(A) In general. . . . [T]hat portion of the distribution which is not a dividend, to the extent that it exceeds the adjusted basis of the stock, shall be treated as gain from the sale or exchange of property.

. . . .

Section 316 of Title 26, United States Code, provides in relevant part:

> (a) General rule. For purposes of this subtitle, the term "dividend" means any distribution of property made by a corporation to its shareholders--
>
> (1) out of its earnings and profits accumulated after February 28, 1913 . . . .
>
> . . . .
>
> Except as otherwise provided in this subtitle, every distribution is made out of earnings and profits to the extent thereof, and from the most recently accumulated earnings and profits. To the extent that any distribution is, under any provision of this subchapter, treated as a distribution of property to which section 301 applies, such distribution shall be treated as a distribution of property for purposes of this subsection.

STATEMENT OF THE CASE

Petitioner Michael Boulware founded Hawaiian Isles Enterprises ("HIE") in the 1980s and served as chairman and president of the company. HIE and its subsidiaries sell coffee, bottled water,

and other products. At all relevant times, Boulware owned 50 percent of the HIE stock and controlled the company.

In 2001, the government obtained an indictment against Boulware in the District of Hawaii, charging him with tax evasion and tax perjury. The tax counts alleged that Boulware failed to report as income approximately $10 million allegedly diverted from HIE in various ways over a period of years. ER 23, 521.[1] Following a guilty verdict in Boulware's first trial, the United States Court of Appeals for the Ninth Circuit reversed his conviction because the district court erroneously excluded crucial evidence. *United States v. Boulware*, 384 F.3d 794 (9th Cir. 2004) (App. 33), *cert. denied*, 546 U.S. 814 (2005).

As a key element of his defense at the retrial, Boulware sought to negate the "tax deficiency" and false statement elements of the tax evasion and tax perjury charges by establishing that the money he received from HIE constituted nontaxable returns of capital he had invested in the company. ER 259, 369, 372, 540-48, 608, 629-30. The district court precluded this evidence and refused to give a return of capital jury instruction. App. 74-83; ER 488-89, 596-99, 629-30, 746. The jury found Boulware guilty.

On December 13, 2006, the court of appeals affirmed Boulware's conviction. *United States v. Boulware*, 470 F.3d 931 (9th Cir. 2006) (App. 17).

[1] The Excerpts of Record from the court of appeals will be cited as "ER."

Finding that Boulware's proffered evidence in support of his return of capital defense did not satisfy the "contemporaneous intent" requirement that the Ninth Circuit added to the return of capital rules in *United States v. Miller*, 545 F.2d 1204 (9th Cir. 1976), the court of appeals concluded that the district court did not err in excluding the return of capital evidence and in refusing to instruct on the defense. App. 20-23.

This Court granted certiorari. After having urged the court of appeals to follow *Miller*, the government largely abandoned that decision and its reasoning before this Court. *See Boulware v. United States*, 128 S. Ct. 1168, 1180 (2008). The government raised new issues, including (as significant here) the contention that Boulware had not established that HIE's distributions to him were "with respect to its stock" for purposes of 26 U.S.C. § 301(a).

This Court unanimously vacated the Ninth Circuit's decision. The Court rejected the *Miller* "contemporaneous intent" requirement. 128 S. Ct. at 1180. It declared that the phrase "with respect to its stock" in § 301(a) "requires that the distribution of property by the corporation be made to a shareholder because of his ownership of its stock . . . and that an amount paid by a corporation to a shareholder be paid to the shareholder in his capacity as such." *Id.* (quotations omitted). It noted that facts bearing on the issue "may range from the distribution of stock ownership to conditions of corporate employment (whether, for example, a shareholder's efforts on behalf of a corporation amount to a good reason to

treat payment of property as salary)." *Id.* at 1180-81 (footnote omitted). The Court observed that "[t]he facts in this case have yet to be raked over with the stock ownership condition in mind, since *Miller* seems to have pretermitted a full consideration of the defensive proffer, and if consideration is to be given to that condition now, the canvas of evidence and Boulware's proffer should be made by a court familiar with the whole evidentiary record." *Id.* at 1181. The Court remanded "for further proceedings consistent with this opinion." *Id.* at 1182.

The Court noted that the government did not "dispute that Boulware offered sufficient evidence of his basis and HIE's lack of earnings and profits." *Id.* at 1180 n.12.[2] Nothing in the Court's opinion suggests that it intended the Ninth Circuit to re-open the basis issue on remand.

The court of appeals rendered its decision on remand on March 9, 2009. The court found that, following this Court's decision, the return of capital defense has three parts: "(1) a corporate distribution with respect to a corporation's stock, (2) the absence of corporate earnings or profits, and (3) the stockholder's stock basis be in excess of the value of

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[2] The Court cited the Brief for the United States at 34 n.11. In that footnote, the government stated: "Although petitioner's proffer is insufficient on its face with respect to the other two elements [basis and earnings and profits] as well, the government did not raise that issue in its opposition to the petition for a writ of certiorari. Nor did the government present the argument in the courts below, except when it argued in opposition to the petition for rehearing in the court of appeals that petitioner's proffer made no assertion that he had a sufficient stock basis to cover the amount of the diverted funds."

the distribution." App. 8-9. It observed that "'[t]he legal standard is generous: a defendant is entitled to an instruction concerning his theory of the case if the theory is legally sound and evidence in the case makes it applicable, even if the evidence is weak, insufficient, inconsistent, or of doubtful credibility. . . . A defendant needs to show only that there is evidence upon which the jury could rationally sustain the defense." App. 6 (quoting *United States v. Kayser*, 488 F.3d 1070, 1076 (9th Cir. 2007)) (internal quotations omitted).

The Ninth Circuit concluded that Boulware had not satisfied this standard either on the "with respect to its stock" prong of the return of capital theory or on the "basis" prong. The court of appeals "recognize[d] . . . that the argument before the trial court primarily involved the application of *Miller* and that we are viewing this case in hindsight." App. 13 n.5. Nonetheless, the court refused to "relieve the defendant of making an offer of proof that satisfies all the elements of the theory asserted," *id.*, and it refused to permit Boulware to supplement his offer of proof, App. 9-10.

On the "with respect to its stock" aspect of the return of capital theory, the panel--like this Court--declined to "define the contours" of that phrase. It concluded, however, that "at the very least a taxpayer must tender some evidence of nexus between the corporate distribution and stock ownership, or show that there were no other alternate explanations, in order to proceed with a return of capital theory at trial." App. 14 (footnote omitted).

The court of appeals found that Boulware had not met this burden. It declared that he had "failed to establish in the record before the district court that he only could have received the distribution in his capacity as a shareholder. To the contrary, Boulware offered evidence and alternate theories that the distribution was a loan or was distributed in trust. Moreover, the proffer only referenced corporate earnings, without any offer to prove that the distribution was 'with respect to stock,' or that any nexus existed between the distribution and Boulware's stock ownership." App. 13. The court of appeals acknowledged that "a defendant may pursue alternative theories," but observed that "when one attempts to characterize a transaction solely by negative inference, rather than affirmative proof, one usually must eliminate other possible theories, not prove their viability." App. 14 n.7.[3]

The court of appeals also found that Boulware had not met his burden on the "basis" prong of the return of capital theory. It recognized that the government did not raise this issue at trial or on appeal (until opposing Boulware's petition for rehearing) and that this Court treated the matter as conceded. App. 15 n.9. It observed that "[u]nder other circumstances, we might well consider the objection waived and decline to exercise our discretion to entertain it." App. 15-16 n.9. Under these circumstances, however, the court decided to "exercise our discretion . . . to analyze whether the element has been satisfied sufficiently to allow

[3] The court of appeals overlooked that the jury did not accept—and thus that Boulware did not "prove [the] viability" of—his alternate theories that the distributions were loans or in trust.

presentation of the theory to a jury at a new trial." App. 16 n.9.

Turning to the substance of the proffer, the Ninth Circuit declared that "[t]he corporate distributions to Boulware totaled $10 million. Thus, in order for the distributions to be considered returns of capital, his stock basis must equal or exceed that amount." App. 15. The court found that Boulware presented evidence at trial from which "a jury could conclude that Boulware was a shareholder with a stock basis, but the evidence was insufficient to meet the threshold requirement that he have a stock basis in excess of $10 million." *Id.*

REASONS FOR GRANTING THE WRIT

The Court should grant the writ for three reasons. *First*, the court of appeals' decision on remand improperly heightens a criminal defendant's burden of producing evidence to obtain an instruction on a defense that negates an element of the offense. The decision thus conflicts with settled law from this and other courts. *Second*, the Ninth Circuit's decision establishes an unprecedented and ill-advised substantive hurdle that a party must surmount to establish that a payment by a corporation to a controlling shareholder is a constructive distribution under 26 U.S.C. § 301. The court's decision, if permitted to stand, will radically alter the standards that govern the taxability of payments by corporations to controlling shareholders and reintroduce uncertainty that the Tax Court and this Court sought to eliminate. *Third*, by choosing to address the basis issue that the government forfeited

below and did not dispute in this Court, the court of appeals exceeded the scope of this Court's remand.

I. THE COURT SHOULD GRANT THE WRIT TO RESTORE THE PROCEDURAL AND SUBSTANTIVE STANDARDS THAT GOVERN THE RETURN OF CAPITAL DEFENSE.

The Ninth Circuit's conclusion that Boulware's proffer was insufficient on the "with respect to its stock" aspect of the return of capital rule conflicts with cases establishing the burden of production a criminal defendant must meet to obtain an instruction on a defense that negates an element of the charged crime. The court of appeals' decision also creates an unprecedented and ill-advised substantive barrier to treatment of distributions from corporations to shareholders as constructive dividends and reintroduces uncertainty that the Tax Court and this Court took pains to eliminate.

A. The Ninth Circuit's Decision Places an Unconstitutional Burden of Proof on a Criminal Defendant.

Boulware invoked the return of capital rule to negate the government's proof on the "tax deficiency" element of tax evasion and the falsity element of tax perjury. *See Boulware*, 128 S. Ct. at 1174, 1178 & n.9. When a defendant seeks to present a defensive theory that negates an element of the offense, as Boulware did here, he need only meet a burden of production; the government bears the "ultimate burden of persuasion" on the element beyond a

reasonable doubt. *E.g., United States v. Bruce*, 394 F.3d 1215, 1222-23 (9th Cir. 2005); *see Boulware*, 128 S. Ct. at 1181 n.14 (noting burden of production issue); *Sandstrom v. Montana*, 442 U.S. 510 (1979) (due process limits shifting of burden of proof to defendant).

As the court of appeals purported to recognize, "[t]he legal standard is generous: a defendant is entitled to an instruction concerning his theory of the case if the theory is legally sound and evidence in the case makes it applicable, even if the evidence is weak, insufficient, inconsistent, or of doubtful credibility. . . . A defendant needs to show only that there is evidence upon which the jury could rationally sustain the defense." App. 6 (quotations omitted); *see, e.g., Mathews v. United States*, 485 U.S. 58, 63 (1988) ("As a general proposition a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable juror to find in his favor.") (considering affirmative defense of entrapment). Every court of appeals to consider the question has adopted some variation of this standard.[4]

Although the court below recited the correct standard, it held Boulware to a far more stringent burden. It declared that Boulware "failed to

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[4] *See United States v. Bok*, 156 F.3d 157, 163 (2d Cir. 1998) (return of capital defense); *see also, e.g., United States v. Kayser*, 488 F.3d 1070, 1076 (9th Cir. 2007) (unreported tax deductions); *United States v. Walters*, 913 F.2d 388, 391 (7th Cir. 1990) (advice of counsel defense); *United States v. Duncan*, 850 F.2d 1104, 1117 (6th Cir. 1988) (advice of accountant defense); *United States v. Casperson*, 773 F.2d 216, 223 n.12 (8th Cir. 1985) (good faith defense).

establish in the record before the district court that he only could have received the distribution in his capacity as a shareholder." App. 13.

The Ninth Circuit's requirement that Boulware "establish" the fact that the jury would be asked to determine, as a condition for getting an instruction on the return of capital defense, conflicts with the settled burden of production in the Ninth Circuit and elsewhere. That onerous burden violates Boulware's Fifth Amendment right to due process and his Sixth Amendment right to have a properly instructed jury determine the facts. Contrary to the court of appeals' analysis, the question plainly is *not* whether Boulware "established" that he could "only" have received the distributions in his capacity as a shareholder; it is whether "there exists evidence sufficient for a reasonable juror to find in his favor." *Mathews*, 485 U.S. at 63; *see, e.g., Kayser*, 488 F.3d at 1076. That is a far different, and lighter, burden than the court of appeals imposed.

Under a proper application of the standard that governs a criminal defendant's burden of production, Boulware easily satisfied his burden on the "with respect to its stock" issue. He founded HIE in the 1980s. ER 638. He owned fifty percent of the stock at all relevant times and served as chairman and president. The other fifty percent of the stock was held by a trust that Boulware created for his son, with the boy's mother as trustee. ER 304, 565, 624, 638; T. 7/1/05 (Vol. 5) at 6, 38. For at least part of the relevant period, Boulware was the only signatory on the HIE bank accounts. T. 7/1/05 (Vol.

5) at 23. It was undisputed at trial and on appeal that he controlled HIE.

Boulware drew a substantial salary from HIE for his service as president and chairman, which he reported each year on his personal tax returns. ER 304-05; GX 1, 2, 3, 4, 5, 6, 7, 8, 9 (tax returns reflecting salary from HIE). The distributions at issue here--which were not reported on Boulware's individual tax returns--do not include the HIE salary that he reported. Nor does the record evidence compel a finding that those distributions constitute loans from HIE to Boulware or repayments by HIE of loans from Boulware to the company.

This evidence provides a sufficient ground for a jury rationally to infer that HIE made the distributions to Boulware because of his stock ownership and not in any nonshareholder capacity, such as employee or creditor. In the language of the court of appeals' opinion, the jury could infer from the evidence in the record that there was a "nexus between [HIE's distributions to Boulware] and [Boulware's] stock ownership." App. 14. No case of which we are aware, civil or criminal, has required a greater showing than this to satisfy the "with respect to its stock" requirement of 26 U.S.C. § 301(a).

B. The Ninth Circuit's Decision Creates a New and Ill-Advised Substantive Hurdle for "Constructive Dividend" Treatment of Corporate Distributions.

In addition to imposing an impermissible burden of proof on a criminal defendant, the Ninth

Circuit's ruling on remand creates an unprecedented and ill-advised substantive hurdle to treatment of distributions from corporations to controlling shareholders as "constructive dividends." The court of appeals' interpretation of the "with respect to its stock" requirement in § 301(a) radically alters the settled application of that language and reintroduces uncertainty that the Tax Court and this Court took pains to eliminate.

At least since the Tax Court's seminal decision in *Truesdell v. Commissioner*, 89 T.C. 1280 (1987), courts have analyzed corporate distributions to controlling shareholders in strict binary fashion: *either* the shareholder receives the distribution in a nonshareholder capacity (as salary or as a loan, for example) *or* the shareholder receives the distribution in his capacity as a shareholder. In the *first* circumstance--where the shareholder receives the distribution other than in a shareholder capacity--the tax effect of the distribution at the corporate and individual levels is determined according to the nature of the transaction. For example, if the distribution is salary to the shareholder for services rendered to the corporation, the corporation generally can deduct the payment as a business expense under 26 U.S.C. § 162, and the shareholder must pay tax on the salary received as ordinary income. To cite another example, if the distribution is a loan from the corporation to the shareholder, the corporation generally may not claim a deduction for the amount transferred to the shareholder, but the shareholder is not taxed individually on the amount received as a loan.

In the *second* circumstance--where the shareholder receives the distribution in a shareholder capacity--the corporation is not entitled to a deduction, and the rules set out in §§ 301 and 316 determine whether the shareholder must pay tax on the amount received (and whether the ordinary income or capital gain tax rates apply). *See Boulware*, 128 S. Ct. at 1173-74.

Both *Truesdell* (89 T.C. at 1298) and this Court (*Boulware*, 128 S. Ct. at 1179-80) squarely reject the notion that distributions from corporations to controlling shareholders can fall into a *third* category--described by this Court as "tax limbo"--subject to the general definition of income in 26 U.S.C. § 61(a). Those cases leave no doubt that distributions to shareholders are either in their capacity as such--and thus governed by §§ 301 and 316--or in a nonshareholder capacity, and thus governed by other specific provisions of the Tax Code.

Of crucial significance here, the phrase "with respect to its stock" in § 301(a) serves to distinguish these two circumstances; that is its sole function. *See* S. Rep. 1622, 83d Cong., 2d Sess. 231 (1954) ("Subsection (a) accordingly makes clear that section 301 has applicability only to distributions of property to shareholders in their capacity as such. For example, a distribution of property to a shareholder who is a creditor of the corporation in satisfaction of his claim against the corporation is not within the scope of section 301."). As Professors Bittker and Eustice explain, "Even though such transfers are 'distributions,' in the sense of being transfers, they

are not made to a shareholder 'with respect to [his] stock,' as required by § 301(a), because the corporation receives equal value . . . ; hence, the tax consequences of such transfers are governed by other sections of the Code." 1 Boris I. Bittker & James S. Eustice, *Federal Income Taxation of Corporations and Shareholders* ¶ 8.05[1], at 8-39 (7th ed. 2006) (footnote omitted).

The court of appeals' decision overlooks this simple function of the "with respect to its stock" language in § 301(a) and creates precisely the "tax limbo" that this Court rejected. *Boulware*, 128 S. Ct. at 1180. Under the Ninth Circuit's decision, if no affirmative evidence is produced of a "nexus" between "the distribution and [the stockholder's] stock ownership" (App. 14), and if it is not shown that the stockholder "only could have received the distribution in his capacity as a shareholder" (App. 13), then the distribution presumably falls into some undefined third category--neither subject to the constructive dividend rules of §§ 301 and 316 nor subject to the specific rules governing funds that a shareholder receives in a nonshareholder capacity.

The Ninth Circuit's novel construction of the "with respect to its stock" language in § 301(a) will, of course, make it more difficult for criminal defendants to assert the return of capital defense. But the decision has even greater potential ramifications in the civil tax context.

No civil tax case since *Truesdell* has required, as a condition to application of the constructive dividend rules in §§ 301 and 316, *express* evidence of

a nexus between a distribution to a controlling shareholder and the shareholder's stock ownership, nor has any decision required proof (in the Ninth Circuit's words) that the shareholder "only could have received the distribution in his capacity as a shareholder." App. 13. Instead, courts simply infer (usually without comment) that a controlling shareholder receives the distribution because of his stock ownership in the absence of affirmative evidence that he received it in some other, nonshareholder capacity.[5] That is why the court of appeals did not discuss the "with respect to its stock" requirement in *Miller* or in its prior decisions in this case, why the government never raised the issue before the district court or the court of appeals (until opposing the petition for rehearing in Boulware's prior appeal), and why the civil tax cases addressing corporate distributions to controlling shareholders similarly do not address the issue.[6]

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[5] For a small sample of the many such cases, see, *e.g.*, *Neonatology Associates, P.A. v. Commissioner*, 299 F.3d 221, 231-32 (3d Cir. 2002); *Pittman v. Commissioner*, 100 F.3d 1308, 1314-15 (7th Cir. 1996); *Crowley v. Commissioner*, 962 F.2d 1077, 1081 (1st Cir. 1992); *Green v. United States*, 460 F.2d 412, 419-20 (5th Cir. 1972); *King's Court Mobile Home Park v. Commissioner*, 98 T.C. 511, 514 (1992); *Federbush v. Commissioner*, 34 T.C. 740, 750-54 (1960), *aff'd*, 325 F.2d 1 (2d Cir. 1963) (per curiam).

[6] Ironically, in a civil tax proceeding involving HIE and Boulware, the IRS recently succeeded in convincing the Tax Court that certain professional fees that HIE paid on Boulware's behalf are constructive dividends taxable to Boulware personally. *HIE Holdings, Inc. v. Commissioner*, T.C. Memo 2009-130, 2009 Tax Ct. Memo LEXIS 142, at *308-*321 (June 8, 2009). The Tax Court based its constructive dividend holding on its conclusion that the fee payments were made primarily to benefit Boulware and without expectation of repayment. *See id.* at *310. The Tax Court did not require any

The Ninth Circuit's decision has reintroduced the "tax limbo" that the Tax Court and this Court have rejected. The Court should grant review to ensure that the court of appeals' decision does not substantially upset settled law.

II. THE COURT SHOULD GRANT THE WRIT BECAUSE THE COURT OF APPEALS EXCEEDED THE SCOPE OF THIS COURT'S REMAND.

The Ninth Circuit's "basis" decision also warrants this Court's review and reversal. The court of appeals' consideration of the basis issue does not comply with the remand from this Court. Having addressed only the government's "with respect to its stock" argument and treated basis as undisputed, this Court remanded to the panel "for further proceedings consistent with this opinion." *Boulware*, 128 S. Ct. at 1182. It is not "consistent with" this Court's opinion to address an issue that the government did not dispute before the trial court, before the court of appeals panel, or before this Court and that this Court treated as conceded and thus did not address. This Court has not hesitated in the past to review a case a second time to ensure

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(continued...)

further showing on the "with respect to its stock" issue; the court inferred, as other courts routinely have done, that distributions to a controlling shareholder not made in a nonshareholder capacity satisfy the "with respect to its stock" standard in § 301(a). It is remarkable--and strikingly unfair--that Boulware would face different interpretations of the same statutory language before different courts, with both interpretations to his disadvantage.

compliance with its directives on remand, and we ask it to do so here. *See, e.g., Sumner v. Mata*, 455 U.S. 591, 598 (1982) (per curiam); *General Atomic Co. v. Felter*, 436 U.S. 493, 497 (1978); *Stanton v. Stanton*, 429 U.S. 501, 503-04 (1977); *In re Potts*, 166 U.S. 263, 268 (1897).

It was particularly unfair for the court of appeals to allow the government to raise an issue it had long since forfeited and at the same time to hold Boulware strictly to the terms of the proffer he had made in the district court, when the sole issue in dispute was the *Miller* "contemporaneous intent" requirement that this Court later rejected. *Compare* App. 9-10, 13 n.5 (holding Boulware to his district court proffer) *with* App. 15 n.9 (permitting government to raise basis issue). Had the government raised the basis requirement in the district court, of course, Boulware could have supplemented his proffer to the extent it fell short.[7]

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[7] The panel erred in concluding that Boulware must show either $10 million in basis or forgo the return of capital defense. Boulware was entitled to present that defense up to the amount of his basis, regardless of whether that defense eliminated $3 million of the alleged unreported income, or $5 million, or the entire amount. The alleged $10 million in unreported income consisted of money in varying amounts from various sources received over a period of years. Boulware's alternative explanations (other than return of capital) varied from one sum of money to another. The jury returned a general verdict. Thus, it is impossible to know if the jury credited some aspects of Boulware's defense but found enough of the money unexplained to create a tax deficiency under 26 U.S.C. § 7201. Under these circumstances, there is a substantial likelihood that proof that millions of dollars of the total amount was nontaxable would have changed the outcome.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 2009

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee*, v. MICHAEL H. BOULWARE, *Defendant-Appellant.*	No. 05-10752 D.C. No. CR-99-00239-ER OPINION

Appeal from the United States District Court
for the District of Hawaii
Hon. Edward Rafeedie,*
Senior District Judge, Presiding

Argued and Submitted
January 21, 2009 – Pasadena, California

Filed March 9, 2009

Before: Pamela Ann Rymer and
Sidney R. Thomas, Circuit Judges,
and Stephen G. Larson,** District Judge.

Opinion by Judge Thomas

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* The Honorable Edward Rafeedie, Senior District Judge for the Central District of California, sitting by designation. The panel notes with regret the passing of Judge Rafeedie, who served as a federal district judge with great distinction from 1982 until his untimely death in 2008. He will be greatly missed.

** The Honorable Stephen G. Larson, United States District Judge for the Central District of California, sitting by designation.

COUNSEL

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OPINION

THOMAS, Circuit Judge:

This case returns to us from the Supreme Court with directions to conduct a thorough examination of the record to determine whether or not the defendant's offer of proof was sufficient to justify the presentation of a "return of capital" theory to the jury. We conclude it was not and affirm the judgment of the district court.

I

The facts of this case have been described fully in prior appellate decisions,[1] so we need not explain the

[1] *Boulware v. United States*, ___ U.S. ___, 128 S. Ct. 1168 (2008) ("*Boulware III*"); *United States v. Boulware*, 470 F.3d 931 (9th Cir. 2006) ("*Boulware II*"); *United States v. Boulware*, 384 F.3d 794 (9th Cir. 2004) ("*Boulware I*").

background in detail. In brief, Michael H. Boulware was the president and fifty-percent owner of Hawaiian Isles Enterprises ("the corporation"), a distributor of tobacco, water, coffee, vending machines, and video games. Boulware was initially convicted on five counts of filing a false tax return in violation of 26 U.S.C. § 7206(1), four counts of tax evasion in violation of 26 U.S.C. § 7201, and conspiracy to make a false statement to a federally-insured financial institution in violation of 18 U.S.C. § 371, all related to his receipt of certain funds from the corporation without disclosing the same on his income tax returns.

On appeal from the first trial, we reversed the tax convictions because of the exclusion of evidence regarding a state court's adjudication of property rights in funds diverted from the corporation, and affirmed the conspiracy conviction. *Boulware I,* 384 F.3d at 798-99.

Boulware was re-tried and convicted on the five counts of filing false tax returns and the four counts of willfully attempting to evade taxes. The government's theory was that Boulware diverted more than $10 million from the corporation for his personal use, without disclosing those funds in his tax returns. Boulware asserted a number of alternative theories in an attempt to show the diversions were proper,[2]

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[2] Boulware also argued, as he had in *Boulware I,* that the corporate distributions were actually loans, *see* 384 F.3d at 811, or, alternatively, that the funds were held in trust for the purchase of his then-wife's stock, *see* 384 F.3d at 800.

including claiming the distributions were a non-taxable return of capital. To that end, Boulware sought to present evidence, including expert witness testimony, that the corporation had no earnings and profits in the relevant taxable years, so the money distributed by the corporation was, in fact, a non-taxable return of capital up to the amount of his basis in his stock. 26 U.S.C. §§ 301, 316(a).

The government filed a motion in limine to prevent Boulware from presenting evidence regarding the "return of capital" theory. It relied on then-existing circuit precedent that a defendant was required, as a prerequisite to the assertion of the theory, to show that the corporation intended the distribution to be a return of capital. *See United States v. Miller,* 545 F.2d 1204, 1215 (9th Cir. 1976).

The district court granted the motion in limine because Boulware's proffer failed to satisfy *Miller* and because much of the evidence was excludable as improper legal opinion. After Boulware was convicted a second time, we affirmed the district court's denial of the proffer because *Miller* required "some demonstration on the part of the defendant or corporation that distributions were intended to be a return of capital." *Boulware II,* 470 F.3d at 933-34.

The Supreme Court reversed *Boulware II,* holding that the *Miller* rule upon which the panel was required to rely was incorrect, and concluding that a defendant could establish a return of capital or assert the return of capital theory without a showing of

contemporaneous intent to make a distribution. 128 S. Ct. at 1180. As the Court noted, under the relevant statutory sections, "the tax consequences of a 'distribution by a corporation with respect to its stock' depend, not on anyone's purpose to return capital or to get it back, but on facts wholly independent of intent: whether the corporation had earnings and profits, and the amount of the taxpayer's basis for his stock." *Id.* at 1177.

The Supreme Court agreed, however, that the theory requires more than merely showing that the corporation lacked earnings and the recipient's stock basis was in excess of the distribution, emphasizing that there must be evidence that the distribution was "with respect to . . . stock." *Id.* at 1180. The Supreme Court then remanded with instructions for us to reconsider the proffer in light of its decision and the entire record of the case.

We review a district court's decision to admit or exclude expert opinion testimony under the deferential abuse of discretion standard. *United States v. McCaleb,* 552 F.3d 1053, 1060 (9th Cir. 2009). We review *de novo* whether an offer of proof satisfies the elements of the asserted defense. *United States v. Schoon,* 971 F.2d 193, 195 (9th Cir. 1992).

II

"Due process requires that criminal prosecutions 'comport with prevailing notions of fundamental fairness' and that 'criminal defendants be afforded a

meaningful opportunity to present a complete defense.'" *Clark v. Brown,* 450 F.3d 898, 904 (9th Cir. 2006) (quoting *California v. Trombetta,* 467 U.S. 479, 485 (1984)). "A defendant is entitled to an instruction on his theory of the case if the theory is legally cognizable and there is evidence upon which the jury could rationally find for the defendant." *United States v. Morton,* 999 F.2d 435, 437 (9th Cir. 1993).

On remand, the question for us is whether the tender of evidence to support the "return of capital" theory was sufficient to allow the presentation of the evidence and theory to the jury. As we noted in *United States v. Kayser,* 488 F.3d 1070, 1076 (9th Cir. 2007):

> The legal standard is generous: "a defendant is entitled to an instruction concerning his theory of the case if the theory is legally sound and evidence in the case makes it applicable, even if the evidence is weak, insufficient, inconsistent, or of doubtful credibility." *United States v. Washington,* 819 F.2d 221, 225 (9th Cir. 1987). A defendant needs to show only that "there is evidence upon which the jury could rationally sustain the defense." *United States v. Jackson,* 726 F.2d 1466, 1468 (9th Cir. 1984) (per curiam).

On the other hand, a trial court may preclude a defense theory where "the evidence, as described in the defendant's offer of proof, is insufficient as a matter of law to support the proffered defense." *United States v. Dorrell,* 758 F.2d 427, 430 (9th Cir.

1985). Counsel must also "articulate every ground on which the evidence is admissible, since a ground not identified at trial will not provide a basis for reversal on appeal." Jack B. Weinstein and Margaret Berger, *Weinstein's Federal Evidence,* § 130.20[5], p. 103-39 (Joseph M. McLaughlin, ed., Matthew Bender 2d. ed. 2008); *see also Hudspeth v. Comm'r,* 914 F.2d 1207, 1215 (9th Cir. 1990) (holding that failure to identify ground of admissibility limited appellate review to plain error).

In support of his assertion of the return of capital theory, Boulware made an offer of proof as to expert testimony and evidence regarding corporate earnings.

A

We need not consider whether Boulware's proffer of expert testimony satisfied the requirement that the defendant minimally establish all the elements of the asserted theory because the trial court denied the proffer on alternate and adequate grounds. In addition to precluding the testimony on the basis of *Miller,* the district court excluded the expert testimony because it constituted a legal opinion. It did not abuse its discretion in doing so. *United States v. Scholl,* 166 F.3d 964, 973 (9th Cir. 1999); *see also Aguilar v. International Longshoremen's Union,* 966 F.2d 443, 447 (9th Cir. 1992) (noting matters of law are for the court's determination, not that of an expert witness).

Here, Boulware's expert sought to testify that the corporate distributions were legally non-taxable, either because they were loans, monies placed in trust, or returns of capital. The trial court's exclusion of the expert testimony to the extent that it constituted a legal opinion was well within its discretion. *See Nationwide Transp. Fin. v. Cass Info. Sys.*, 523 F.3d 1051, 1059-60 (9th Cir. 2008) ("[A]n expert witness cannot give an opinion as to her *legal conclusion,* i.e., an opinion on an ultimate issue of law.") (quoting *Hangarter v. Provident Life & Accident Ins. Co.*, 373 F.3d 998, 1016 (9th Cir. 2004)).

B

Boulware sought to introduce other evidence in support of his return of capital theory. Specifically, Boulware wished to introduce evidence that the corporation had over-reported earnings in its tax returns to show that the corporate distributions to Boulware "could be deemed a constructive dividend or return of capital to Boulware which may or may not be income depending on whether [the corporation] had earnings or profits for the years when the monies were obtained by Boulware."

After a careful examination of the record, we conclude that the district court properly declined the offer of proof as to the return of capital theory because the offer failed to satisfy all the elements of the theory. As the Supreme Court explained in *Boulware III,* the return of capital theory requires: (1) a

corporate distribution with respect to a corporation's stock, (2) the absence of corporate earnings or profits, and (3) the stockholder's stock basis be in excess of the value of the distribution. 128 S. Ct. at 1180 & n.12.

The admission of evidence of corporate earnings, by itself, is plainly insufficient to satisfy the elements necessary to assert a return of capital theory. However, in evaluating an offer of proof on appeal, we are not confined to the four corners of the formal offer, but may evaluate "evidence . . . made known to the court." *Movie 1 & 2 v. United Artists Commc'ns, Inc.*, 909 F.2d 1245, 1249 (9th Cir. 1990). Thus, in evaluating whether the defendant was entitled to present a return of capital theory, we examine not only the formal offer of proof, but the record as a whole to see if "there is evidence upon which the jury could rationally sustain the defense." *Kayser,* 488 F.3d at 1076 (quoting *Jackson,* 726 F.2d at 1468).

However, we will not consider any new offers on appeal, as Boulware seems to suggest we should. *See United States v. Lara-Hernandez,* 588 F.2d 272, 274 (9th Cir. 1978) (holding it was too late to present an additional theory of relevance of evidence after the verdict). "The offer of proof required by Rule 103(a)(2) is meant to give the trial judge *contemporaneous* knowledge about the proposed evidence, so that the judge can make a proper ruling on the evidence at the time it is offered." Weinstein at § 130.20[4], p. 103-38.1. The point of an offer of proof is to preserve the issue for appeal, not to create a new evidentiary issue

on appeal. In addition, except in extraordinary circumstances, we generally will not allow parties to supplement the record on appeal. *See Lowry v. Barnhart,* 329 F.3d 1019, 1024 (9th Cir. 2003) (noting the general rule against supplementation of the trial record on appeal and that Fed. R. App. P. 10(e)(2)(C) allows the court of appeals to supplement the record only by formal motion based on extraordinary circumstances or error correction).

1

The first element necessary to the assertion of a return of capital theory is that the corporate distribution be "with respect to . . . stock." *Boulware III,* 128 S. Ct. at 1180. The Supreme Court declined to define this element in any particularity, noting:

> This, however, is not the time or place to home in on the "with respect to . . . stock" condition. Facts with a bearing on it may range from the distribution of stock ownership to conditions of corporate employment (whether, for example, a shareholder's efforts on behalf of a corporation amount to a good reason to treat a payment of property as salary).

Id. at 1180-81 (footnote omitted).

Despite the Supreme Court's rejection of a contemporaneous intent requirement for the return of capital theory, the government contends that we should require the defendant to make some showing

of intent before a distribution may be considered to be "with respect to stock." This suggestion flies squarely in the face of the Supreme Court's admonition in *Boulware III* that the tax consequences of a corporate distribution should be evaluated "on facts wholly independent of intent." 128 S. Ct. at 1177.

As the Supreme Court explained, because a particular corporate distribution with respect to stock may be considered ordinary income, capital gain, or a non-taxable event, depending on corporate earnings and profits and the taxpayer's basis in the stock,[3] "[t]he determination is computational and not dependent upon intent." *Id.* (quoting IRS Non Docketed Service Advice Review, 1989 WL 1172952 (Mar. 15, 1989)). In short, in this context, "intent is irrelevant." *Id.* (quoting IRS Non Docketed Service Advice Review, 1989 WL 1172952). An intent-based requirement would also eviscerate the tax evasion statute's requirement of a tax deficiency, meaning that a taxpayer could be found guilty of tax evasion without owing taxes. *Boulware II,* 470 F.3d at 938 (Thomas,

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[3] Under § 301(a), unless the Internal Revenue Code requires otherwise, "a distribution of property . . . made by a corporation to a shareholder with respect to its stock shall be treated in the manner provided in [§ 301(c)]." Section 301(c) provides that the portion of the distribution that is a "dividend," as defined by § 316(a), must be included in the recipient's gross income; the portion that is not a dividend is, depending on the shareholder's basis for his stock, either a nontaxable return of capital or a taxable capital gain. Section 316(a) defines "dividend" as a "distribution" out of "earnings and profits."

J., concurring). Further, importing a new intent requirement would create a divergence in civil and criminal return of capital theory – a divergence that is not warranted absent unusual circumstances. *Id.*; *see also United States v. Bok*, 156 F.3d 157, 162 (2d Cir. 1998) ("[T]he return of capital theory applies equally in both criminal and civil cases, assuming that the diversion itself was not unlawful."). As the Supreme Court aptly noted, "economic substance remains the right touchstone for characterizing funds received when a shareholder diverts them before they can be recorded on the corporation's books." *Boulware III*, 128 S.Ct. at 1176.

Thus, we reject the government's attempt on remand to graft on a requirement that the taxpayer establish intent as part of the determination as to whether a distribution "was with respect to stock."[4]

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[4] We also reject the government's argument, raised for the first time on remand, that only the government – not the taxpayer – may attempt to characterize a transaction as "with respect to stock" after the transaction has occurred. We previously rejected this argument in *Kayser*, holding that nothing precluded a defendant in a tax evasion case "from asserting a defense that is inconsistent with information falsely reported on his challenged tax returns." 488 F.3d at 1074. As we further noted, a taxpayer was entitled "to present evidence at trial regarding the facts of the transaction at issue, notwithstanding the defendant's improper or 'scrambled' reporting of those facts." *Id.* Although *Kayser* discussed this issue in the context of *Miller*, there is nothing about the reformulated return of capital requirements in *Boulware III* that would lead us to a different conclusion.

Boulware urges on remand that a taxpayer is entitled to a jury instruction on the return of capital theory if he shows he owned stock, received payments from the corporation, and did not receive those payments in any nonstockholder capacity. Even under this definition, Boulware's proffer is insufficient. He failed to establish in the record before the district court that he only could have received the distribution in his capacity as a shareholder. To the contrary, Boulware offered evidence and alternate theories that the distribution was a loan or was distributed in trust. Moreover, the proffer only referenced corporate earnings, without any offer to prove that the distribution was "with respect to stock," or that any nexus existed between the distribution and Boulware's stock ownership. Under *de novo* review of the offer of proof and the record, absent affirmative evidence of nexus or support for a negative inference we must conclude that the trial court did not err in denying the offer of proof.[5]

The Supreme Court declined the opportunity to define the contours of the phrase "with respect to stock," leaving that for another day. So do we.[6] It

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[5] We recognize, of course, that the argument before the trial court primarily involved the application of *Miller* and that we are viewing this case in hindsight. However, that fact does not relieve the defendant of making an offer of proof that satisfies all the elements of the theory asserted.

[6] We also decline, as did the Supreme Court, to consider the implications of *Holland v. United States*, 348 U.S. 121 (1954), and *Sandstrom v. Montana*, 442 U.S. 510, in this context

(Continued on following page)

suffices, however, to say that at the very least a taxpayer must tender some evidence of nexus between the corporate distribution and stock ownership, or show that there were no other alternate explanations,[7] in order to proceed with a return of capital theory at trial. Boulware did neither, and the district court was justified in declining to allow him to present another alternative theory to the jury.

2

The third element[8] necessary to show that a distribution was a non-taxable return of capital is that the stockholder's stock basis exceeded the value of the distribution. Boulware's offer of proof did not, on its face, purport to tender evidence on this element. Therefore, we look to the entire record to ascertain whether there was sufficient evidence to make a threshold showing.

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because the issues raised in those cases are not squarely presented here.

[7] Put another way, "when you have eliminated the impossible, whatever remains, however improbable, must be the truth." Sir Arthur Conan Doyle, *Tales of Sherlock Holmes: The Sign of the Four,* p. 228 (Grosset & Dunlap 1892). Of course, a defendant may pursue alternative theories. However, when one attempts to characterize a transaction solely by negative inference, rather than affirmative proof, one usually must eliminate other possible theories, not prove their viability.

[8] We need not discuss the second element – the absence of corporate earnings or profit – because it was included in Boulware's offer of proof.

The corporate distributions to Boulware totaled $10 million. Thus, in order for the distributions to be considered returns of capital, his stock basis must equal or exceed that amount. There is no formal evidence of Boulware's stock basis in the record, nor did he make an offer of proof as to the amount. In the record, Boulware testified to spending approximately $2 million purchasing Kona coffee beans for the business. He also claims to have borrowed $1.2 million from the corporation to buy equipment for the water plant, and that the water business was given back to the corporation in return for "30 percent more stocks or something." From all of this evidence a jury could conclude that Boulware was a shareholder with a stock basis, but the evidence tendered was insufficient to meet the threshold requirement that he have a stock basis in excess of $10 million.

Therefore, Boulware's tender of proof did not satisfy the requirement that the taxpayer's basis in stock exceed the corporate distribution, providing an additional justification for the trial court to preclude Boulware from presenting a return of capital theory.[9]

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[9] We recognize that the government did not raise this objection at trial. Indeed, this issue was first raised by the government in its reply brief to Boulware's petition for rehearing en banc in this court. The Supreme Court noted that the government had conceded that Boulware's basis was sufficient in its presentation, *Boulware III*, 128 S. Ct. at 1180 n.12 ("Nor does the Government dispute that Boulware offered sufficient evidence of his basis. . . ."), although the government now disputes that it conceded anything. Under other circumstances, we might

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III

In sum, analyzing the specific offer of proof and the record as a whole, we conclude that Boulware's offer of proof was insufficient as a matter of law to support the proffered return of capital theory. We also conclude that the district court did not abuse its discretion in excluding expert legal opinion. Therefore, we conclude that Boulware is not entitled to a third trial. We need not, and do not, reach any other issue urged by the parties.

AFFIRMED.

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well consider the objection waived and decline to exercise our discretion to entertain it. Nevertheless, on remand with instructions to consider the offer in light of the whole record, and mindful that judicial economy militates against ordering a new trial on speculative assertions, we exercise our discretion in this case to analyze whether the element has been satisfied sufficiently to allow presentation of the theory to a jury at a new trial.

470 F.3d 931

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee*, v. MICHAEL H. BOULWARE, *Defendant-Appellant*.	No. 05-10752 D.C. No. CR-99-00239-ER Opinion

Appeal from the United States District Court
for the District of Hawaii
Edward Rafeedie,* Senior District Judge, Presiding

Argued and Submitted
October 16, 2006 – San Francisco, California

Filed December 13, 2006

Before: Pamela Ann Rymer and
Sidney R. Thomas, Circuit Judges,
and Stephen G. Larson,** District Judge

Opinion by Judge Rymer;
Concurrence by Judge Thomas

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* The Honorable Edward Rafeedie, Senior District Judge for the Central District of California, sitting by designation.

** The Honorable Stephen G. Larson, United States District Judge for the Central District of California, sitting by designation.

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OPINION

RYMER, Circuit Judge.

In a return trip following retrial after we reversed his first conviction, *United States v. Boulware*, 384 F.3d 794 (9th Cir. 2004) (*Boulware I*), Michael H. Boulware appeals his conviction and sentence for filing a false tax return in violation of 26 U.S.C. § 7206(1), tax evasion in violation of 26 U.S.C. § 7201, and conspiracy to make a false statement to influence a financial institution in violation of 18 U.S.C. § 1014. We conclude there is no reversible error, and affirm.

I

Without belaboring the background recited in our prior opinion, Boulware is the founder, former President, and majority owner of a closely held corporation, Hawaiian Isles Enterprises (HIE). HIE dealt in tobacco distribution, coffee processing and sales, arcade games, vending machines, and bottled water. A second superceding indictment charged Boulware with thirteen (later reduced to nine) counts of tax evasion and tax fraud in connection with his failure

to report funds diverted from HIE as income for the years 1989-97; one count of conspiracy to make a false statement to influence a financial institution in connection with HIE's use of false invoices in applying for a loan from GECC Finance Corporation; and four counts of making a false statement to influence a financial institution in connection with the false invoices. Boulware was convicted on the tax counts and the conspiracy count, which we reversed on the ground that the district court had erroneously excluded evidence of a Hawaii state court's adjudication of property rights in certain funds diverted from HIE. *Boulware I,* 384 F.3d at 800-09. On retrial as originally, the government's theory was that during the period 1989-1997, through a number of different devices, Boulware diverted more than $10 million from HIE and failed to report or pay taxes on this income; and that he used fraudulent invoices in applying for a bank loan. He was convicted on all counts. The district court again sentenced Boulware to 36 months' imprisonment on the false return counts, but increased the sentence from 51 to 60 months on the tax evasion and conspiracy counts, all to run concurrently.

Boulware timely appeals.

II

Boulware first claims that the district court erred in excluding evidence that he contends would have shown that the funds he took from HIE were

nontaxable returns of capital rather than income. An essential element of the crime of tax evasion is the existence of a tax deficiency. *Boulware I,* 384 F.3d at 810. However, for purposes of civil tax liability, when a distribution from a corporation to its shareholder constitutes a return of capital, that distribution is normally not taxable. 26 U.S.C. §§ 301, 306; *United States v. Miller,* 545 F.2d 1204, 1210-12 & n.5 (9th Cir. 1976). Hence, to negate the tax deficiency element, Boulware sought to show that the money he received from HIE constituted returns of the capital he had invested as the corporation was, at the time, without earnings or profits. The government moved in limine to preclude a "return of capital" defense, relying on *Miller.* There, we held that constructive distribution rules applicable in the civil arena could not be automatically applied to a criminal tax matter in the absence of some demonstration on the part of the defendant or corporation that distributions were intended to be a return of capital. *Id.* at 1214-15. In response, Boulware argued that whether corporate funds could be characterized as a return of capital is a question of fact for the jury, and he proffered testimony of an expert who would explain that if the monies transferred from HIE to Boulware were not loans or advances, or if Boulware did not use those funds for corporate purposes, then the transfer could be deemed a constructive dividend or return of capital to Boulware which may or may not be income to him depending upon whether HIE had earnings and profits for the years when the transfers occurred. The district court ruled that this offer of proof did not

meet the *Miller* threshold because the defendant must show not merely that the funds *could* have been a return of capital, but that the funds were *in fact* a return of capital at the time of the transfer.

Boulware contends that the district court misread *Miller*. In his view, the issue in *Miller* was whether the evidence was sufficient to convict the taxpayer in spite of his return of capital defense, not whether the taxpayer had made a sufficient initial showing to introduce evidence pertaining to that defense; thus, the rest of *Miller* – upon which the district court relied – is dicta. We disagree that any part of *Miller's* reasoning can be disregarded. *See Barapind v. Enomoto,* 400 F.3d 744, 750-51 (9th Cir. 2005) (holding that what a majority opinion says regarding an issue presented for review is the law of the circuit, regardless of whether or not it is "in some technical sense 'necessary' to the disposition in the case"). Boulware concedes that *Miller* controls if this is so. Accordingly, his alternative position that imposing an intent requirement creates a disconnect between civil and criminal liability necessarily fails. We held in *Miller* that the characterization of diverted corporate funds for civil tax purposes does not dictate their characterization for purposes of a criminal tax evasion charge; rather, the appropriate characterization for criminal purposes is whether the defendant has willfully attempted to evade the payment or assessment of a tax. 545 F.2d at 1214. As we explained, "[w]here the taxpayer has sought to conceal income by filing a false return, he has violated

the tax evasion statutes. It does not matter that that amount could have somehow been made non-taxable if the taxpayer had proceeded on a different course." *Id.* Boulware's reliance on *Truesdell v. Commissioner,* 89 T.C. 1280 (1987), where the U.S. Tax Court held that funds diverted from a corporation in excess of earnings and profits were returns of capital, is misplaced because *Truesdell* was a civil proceeding and thus inapposite given *Miller's* explicit holding that civil classifications of diverted corporate funds do not control in criminal cases. *See also United States v. Williams,* 875 F.2d 846, 849-52 (11th Cir. 1989) (approving *Miller* despite *Truesdell* and distinguishing between civil and criminal contexts); *United States v. Schmidt,* 935 F.2d 1440, 1446 (4th Cir. 1991) (noting that "[t]he important distinction between civil and criminal tax cases concerning the key element to be focused upon is compellingly set out in [*Miller*].").

Boulware also posits that requiring a defendant in a criminal case to show that a distribution was intended to be a return of capital unconstitutionally shifts the burden of proof to the defendant, but again, we held in *Miller* and *Boulware I* that once the government has shown that the taxpayer diverted funds from the corporation and failed to report them, the burden shifts to the taxpayer to show that the funds constituted a return of capital. *Boulware I,* 384 F.3d at 811 (citing *Miller,* 545 F.2d at 1215 & n.13). Like the defendant in *Miller,* Boulware "presented no concrete proof that the amounts were considered, intended, or recorded on the corporate records as a

return of capital at the time they were made." *Id.* at 1215. Nor were any adjustments made to HIE's books showing a return of capital to Boulware, or to his co-shareholder. *See id.* at 1214 n.12. Accordingly, the district court properly required a foundation to be laid before allowing the asserted defense to go forward, and properly rejected Boulware's proffer as inadequate.

Finally, Boulware points out that accepting the district court's interpretation of *Miller* puts us in conflict with the Second Circuit, which has held that a taxpayer need not show that the distribution was characterized as a return of capital at the time of the transaction. *See United States v. D'Agostino,* 145 F.3d 69, 72-73 (2d Cir. 1998); *United States v. Bok,* 156 F.3d 157, 162 (2d Cir. 1998) (holding that a showing that a corporation had no earnings and profits is sufficient to support a return of capital defense, but acknowledging that this is a departure from the prevailing view among federal courts). Whether or not the facts in this case would implicate the Second Circuit's rule, which is by no means certain, we are satisfied that the district court correctly interpreted and applied *Miller* by which it, and we, are bound.

III

Secondly, Boulware challenges exclusion of evidence that he believes would have shown that HIE overpaid tobacco taxes and was simply making up for the overpayment by under-reporting income. The

district court sustained a relevance objection to testimony by Boulware's attorney regarding advice he had given Boulware about payment of these taxes, and to testimony by HIE's controller regarding tax adjustments made on HIE's books. Boulware himself, however, was allowed to testify that HIE had been overpaying its tobacco taxes and had tried to recoup these overpayments by underpaying in subsequent periods and adjusting its books accordingly. He admitted that this was "self-help," and testified that he did not understand the increase in HIE's income to have any effect on his own taxes.

We discern no error. Boulware failed before the district court to link the excluded testimony about HIE's tobacco taxes to his personal income taxes, and fares no better before us. His suggestion that tobacco tax evidence was probative of intent lacks factual or legal support. In any event, nothing about it indicates that Boulware did not have income that he failed to report on his personal return. Although the court allowed some exploration of the subject at Boulware's behest, it retained discretion to curtail the extent of it. As the subject itself lacked relevance, the court likewise properly refused to read HRS 245-7 to the jury; whether or not HIE's method of tax recovery was legal under state law had no bearing on whether Boulware was guilty of federal tax evasion or tax fraud.

IV

Boulware next asserts that the court's receipt of a summary exhibit categorizing and organizing a series of schedules listing each financial transaction pertaining to his taxable income over the relevant period offended Rule 1006 of the Federal Rules of Evidence. The government introduced the compilation (Exhibit 3300) through its summary witness, IRS Agent Randall Tanahara. Boulware objected on the ground that Exhibit 3300 was cumulative and not allowed of a summary witness. The court overruled the objection. Later, Boulware moved to strike the exhibit on the ground that it merely summarized evidence already in the record, which the court denied. Boulware did not (and does not) dispute the accuracy of the information contained in the schedules. The jury was instructed that charts and summaries are only as good as the underlying supporting material admitted into evidence, and that the jury should give them only such weight as it thinks the underlying material deserves.

Boulware relies on *United States v. Wood,* 943 F.2d 1048 (9th Cir. 1991), *United States v. Soulard,* 730 F.2d 1292 (9th Cir. 1984), and *United States v. Abbas,* 504 F.2d 123 (9th Cir. 1974), as articulating a bright-line rule against admission of summary charts as evidence. There is no question that, as *Wood, Soulard*, and *Abbas* indicate, we do not approve of receiving summary exhibits of material already in evidence; however, in none of these cases did we reverse for this reason. Moreover, we have elsewhere

recognized a district court's discretion under Fed.R.Evid. 611(a) to admit summary exhibits for the purpose of assisting the jury in evaluating voluminous evidence. *See, e.g., United States v. Poschwatta,* 829 F.2d 1477, 1481 (9th Cir. 1987) (holding that admission of a chart summarizing income figures already admitted into evidence, while perhaps not the best practice, was not an abuse of discretion); *United States v. Gardner,* 611 F.2d 770, 776 (9th Cir. 1980) (holding that admission of a chart summarizing the defendant's financial status was well within the discretion of the trial court pursuant to Fed.R.Evid. 611(a)). Here, the court no doubt believed that it would be helpful to have the voluminous financial materials reduced to summary form (even though, as it happens, the summary was 116 pages long). Nevertheless, we do not need either to embrace or condemn the procedure followed in this case because, even if it were error to allow the summary exhibit into evidence, the error is harmless given admissibility of the underlying data, lack of objection to accuracy of the summary, and the limiting instruction. *See United States v. Krasn,* 614 F.2d 1229, 1238 (9th Cir. 1980) (holding that charts should not have been admitted, but that it was harmless error as the defendant had an opportunity to challenge the facts and data upon which the charts were based and the court gave a limiting instruction); *Gardner,* 611 F.2d at 776 (noting the defendant's opportunity to cross-examine the government witness who prepared the chart and finding no reversible error in admission of chart); *Abbas,* 504 F.2d at 125 (same).

V

The government questioned Boulware during cross-examination about a letter that he had written to his girlfriend, Jin Sook Lee, soon after divorcing his wife in 1994. The letter referred to gifts Boulware had bought for Lee, including a diamond that he testified was purchased with a credit card. The letter was not received into evidence. A 1991 invoice with the name "Gina Lee" reflecting sale of a 5.03 carat diamond for $70,000 was in evidence; this purchase was evidently by cashier's check. The Assistant United States Attorney (AUSA) argued in closing that, based on his recollection, Boulware had "lied to you during the course of this case" about how he bought the diamond and that if he would lie about how he bought a diamond for $70,000, he would lie about how he got $10 million. The day after closing arguments were concluded, Boulware moved for a mistrial, or alternatively, for an instruction about the government's misstatement. The court denied both requests. It found that the AUSA simply made a mistake in good faith and that, assuming the argument was improper, it was not prejudicial because it was but a single part of an extensive litany of evidence showing Boulware's lack of veracity, it had to do with a fifteen-year old event, and the AUSA stated that he was only relating his own recollection.

Even if the AUSA's recollection – thus his statement to the jury – were incorrect, the district court did not clearly err in its findings or abuse its discretion in denying Boulware's requests. The inaccuracy

of the AUSA's characterization was not immediately apparent, and the record was somewhat ambiguous given references to different diamond purchases. Regardless, it is unlikely that the statements materially affected the trial. The jury was instructed that statements of counsel are not evidence, and that the jury's recollection of the evidence controls. *See United States v. Kerr,* 981 F.2d 1050, 1053 (9th Cir. 1992) (observing that "[t]o determine whether the prosecutor's misconduct affected the jury's verdict, we look first to the substance of a curative instruction."). The point was but one of many made in closing about Boulware's credability. And the evidence against Boulware was strong. *See United States v. Weatherspoon,* 410 F.3d 1142, 1151 (9th Cir. 2005) (noting importance of the strength of the case against a defendant in measuring prejudicial effect of improper statements).

VI

We reversed Boulware's first conviction because the district court had erroneously excluded evidence of a state court judgment establishing that money Boulware had taken from HIE and given to Lee was not a gift to her, but rather belonged to HIE and was being held in trust by Lee. *Boulware I,* 384 F.3d at 798, 800. Although we held that the judgment was relevant, we also rejected Boulware's argument that it was controlling on the issue of whether the money held by Lee belonged to HIE and was therefore not taxable to him. The district court on retrial received

the state court judgment into evidence, but it instructed the jury that the state court judgment determined that the money that Boulware transferred to Lee remained the property of HIE; that this determination was not binding on the jury; but that the judgment could be considered in determining the purpose of the transfer and whether it constituted unreported income to Boulware.

Boulware now maintains that the state court judgment resolving the property dispute between Lee and HIE is binding on the federal courts and, additionally, that *Boulware I* was wrong in concluding otherwise. However, *Boulware I* is the law of the case, and controlling. *Jeffries v. Wood,* 114 F.3d 1484, 1489 (9th Cir. 1998) (en banc). Under our mandate, "the district court did not err in ruling that the state court judgment does not have preclusive effect as to the ownership of the monies." *Boulware I,* 384 F.3d at 805. The court's instructions on remand were faithful to *Boulware I,* and thus were not erroneous.

VII

Boulware's press for reversal based on cumulative error fails as there is no accumulation.

VIII

Boulware raises two issues with respect to his sentence. First, he contends that the court's imposing a 60-month term of custody on the tax evasion and conspiracy counts is vindictive given that his original

sentence on these counts, before reversal, was to 51 months. We disagree. Different evidence was adduced upon retrial. For example, Nathan Suzuki testified about Boulware's continuing fraudulent activities even after he knew about the government's investigation. Additional evidence could lead the district judge to find that an increased sentence was objectively justified. *Wasman v. United States,* 468 U.S. 559, 565 (1984).

Additionally, Boulware argues that his sentence of 60 months on the conspiracy conviction is unreasonable and must be vacated if the tax counts are reversed. As we affirm conviction on the tax counts, the premise of Boulware's challenge to the conspiracy sentence disappears.

AFFIRMED.

THOMAS, Circuit Judge, concurring:

I agree entirely with the analysis and conclusions of the majority. I write separately only to comment that if we were writing on a clean slate, rather than under the controlling precedent of *United States v. Miller,* 545 F.2d 1204, 1211-15 (9th Cir. 1976), I would adopt the approach of the Second Circuit concerning the return to capital defense. *See United States v. Bok,* 156 F.3d 157, 162 (2d Cir. 1998); *United States v. D'Agostino,* 145 F.3d 69, 72-73 (2d Cir. 1998).

I believe the Second Circuit's analysis is more consistent with the statutory requirements of criminal tax evasion. The elements of criminal tax evasion under 26 U.S.C. § 7201 are: "(1) the existence of a tax deficiency, (2) willfulness in attempted evasion of taxes, and (3) an affirmative act constituting an evasion or attempted evasion." *United States v. Marabelles,* 724 F.2d 1374, 1380 (9th Cir. 1984). Thus, an explicit requirement to impose liability under § 7201 is "the existence of a tax deficiency." As the majority opinion notes, notwithstanding a taxpayer's wrongful intent regarding diverted income, a sole shareholder of a company cannot be held civilly liable for any distribution that exceeds the earnings and profits of the corporation and that does not exceed the shareholders adjusted basis in the stock – instead such diversions are considered a return of the shareholder's capital investment. *Truesdell v. Commissioner,* 89 T.C. 1280, 1294-95, (T.C. 1987) (relying on 26 U.S.C. §§ 301, 306). *See also United States v. Miller,* 545 F.2d 1204, 1210-12 & n.5 (9th Cir. 1976). Thus, *Miller* – and now the majority opinion – hold that a defendant may be criminally sanctioned for tax evasion without owing a penny in taxes to the government. Not only does this result indicate a logical fallacy, but is in flat contradiction with the tax evasion statute's requirement of "the existence of a tax deficiency." *Marabelles,* 724 F.2d at 1380. Therefore, without the constriction of *Miller,* I would hold that the Second Circuit approach to the return to capital defense is the better one, adopting the approach that "the return of capital theory applies

equally in both criminal and civil cases, assuming the diversion itself was not unlawful." *Bok,* 156 F.3d at 162 (citing *D'Agostino,* 145 F.3d at 72-73).

I emphasize that even if we were to apply *Bok* and *D'Agostino* to the case at hand, the outcome would not be affected. *Bok* expressly holds that the return to capital defense does not apply if the diversion itself were unlawful. *Bok,* 156 F.3d at 162. More broadly, the Internal Revenue Service does not consider distributions to be a return to capital if made for unlawful purposes. *Truesdell,* 89 T.C. at 1298 (only permitting the return to capital defense after determining that the diversions "were not per se unlawful[,] . . . not, at least on their face, stolen, embezzled or diverted in fraud of creditors"). Because Boulware claimed that the diversions were made to defraud his ex-wife from her share of property in the divorce proceedings, these diversions may be properly considered unlawful. *United States v. Boulware,* 384 F.3d 794, 801 (9th Cir. 2004). In addition, the record indicates that Boulware was not a sole shareholder of HIE, which would also likely preclude him from asserting a return to capital defense. *See Truesdell,* 89 T.C. at 1282 (petitioner was president and sole shareholder of the company from which funds were diverted); *Bok,* 156 F.3d at 160 (similarly applying the return to capital defense in the context of a sole shareholder).

384 F.3d 794

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee*, v. MICHAEL H. BOULWARE, *Defendant-Appellant*.	No. 02-10287 D.C. No. CR 99-0239 ER
UNITED STATES OF AMERICA, *Plaintiff-Appellant*, v. MICHAEL H. BOULWARE, *Defendant-Appellee*.	No. 02-10338 D.C. No. CR 99-0239 ER OPINION

Appeal from the United States District Court
for the District of Hawaii
Edward Rafeedie, District Judge, Presiding

Argued and Submitted
December 1, 2003 – San Francisco, California

Filed September 14, 2004

Before: A Wallace Tashima, Sidney R. Thomas,
and Barry G. Silverman, Circuit Judges.

Opinion by Judge Tashima;
Dissent by Judge Silverman

COUNSEL

Dennis E.W. O'Connor, Honolulu, Hawaii, for the defendant-appellant and cross-appellee.

Karen M. Quesnel, Tax Division, U.S. Department of Justice, Washington, D.C., for the plaintiff-appellee and cross-appellant.

OPINION

TASHIMA, Circuit Judge:

Michael H. Boulware appeals from his conviction, after trial by jury, on five counts of filing false tax returns, four counts of tax evasion, and one count of conspiracy to make false statements to a federally-insured financial institution. He contends that all of his convictions must be reversed because the government failed to meet its burden of proof on the tax counts, constructively amended the indictment during trial, and engaged in prosecutorial misconduct. He also contends that the district court prejudicially erred in excluding key evidence and giving inadequate and misleading jury instructions. Finally, he contends that his sentence must be vacated, because the district court failed to resolve factual disputes regarding the amount of the tax loss. In its cross-appeal, the government contends that the district court erred by refusing to enhance Boulware's sentence for obstruction of justice.

Although most of the errors alleged by Boulware do not warrant reversal of his convictions, one of

them does. The district court abused its discretion by excluding evidence of a state-court judgment that directly supported Boulware's defense to the tax charges and that directly contradicted the government's theory of the case – that Boulware had stolen money from his closely-held corporation and gifted it to his girlfriend. As the error went to the heart of Boulware's defense and was not harmless beyond a reasonable doubt, Boulware is entitled to a new trial on the nine tax counts.

I

After a six-year investigation by the Internal Revenue Service ("IRS"), Boulware was indicted on four counts of filing false tax returns for the 1989-1992 tax years, in violation of 26 U.S.C. § 7206(1), one count of conspiring to make a false statement to a federally-insured financial institution, in violation of 18 U.S.C. § 371, and four counts of making such false statements, in violation of 18 U.S.C. § 1014. A tenth count sought forfeiture of funds associated with the false statements. A superseding indictment added five new counts of filing false tax returns, for the 1993-1997 tax years. and four counts of tax evasion, in violation of 26 U.S.C. § 7201, for the 1994-1997 tax years. Finally, a second superseding indictment ("the indictment"), amended the factual allegations of the conspiracy count.

After a six-day trial and two-and-a-half days of deliberations, the jury convicted Boulware on

November 29, 2001, of all nine tax counts.[1] The jury also convicted him of conspiring to make false statements to a federally-insured financial institution, but acquitted him of the substantive false statements counts. The district court sentenced Boulware to a 36-month term of imprisonment on each of the false tax return counts, 51 months on each of the tax evasion counts, and 51 months on the conspiracy count, all terms to run concurrently.[2]

II

Boulware started M&S Vending in 1979, while working as a telephone repairman. The company placed video games in bars and restaurants, and it quickly expanded into other lines of business, such as cigarette sales. In about 1985, the company was renamed Hawaiian Isles Enterprises ("HIE"); Boulware owned all of the shares. HIE branched out into coffee roasting and sales, and formed a subsidiary named Hawaiian Isles Kona Coffee Company. Boulware later acquired a bottled water company and transferred its stock to HIE. By 1989, HIE was reporting gross receipts of over $55 million, and by 1992 sales had topped $85 million.

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[1] During trial, the false tax return counts for the 1994-1997 tax years were severed, redacted from the indictment, and later dismissed with prejudice.

[2] The court also imposed a three-year term of supervised release, fines, and forfeiture of $495,814.

At trial, the government sought to prove that Boulware had systematically diverted funds from HIE in order to support a lavish lifestyle. In particular, that he gave millions of dollars of HIE money to his girlfriend, Jin Sook Lee, and millions of dollars to his wife, Mal Sun Boulware, without reporting any of this money on his personal income tax returns. According to the government, he siphoned off this money primarily by writing checks to employees and friends and having them return the cash to him, by diverting payments by HIE customers, by submitting fraudulent invoices to HIE, and by laundering HIE money through companies in the Kingdom of Tonga and Hong Kong.

With regard to the false statements counts, the government attempted to prove that Boulware and a business associate named Lorin Kushiyama received financing from General Electric Credit Company ("GECC") based on the submission of false invoices. In particular, the government tried to prove that the financing was purportedly to allow Kushiyama's company to purchase video game machines that it would then lease or sell to HIE. According to the government, HIE already owned the machines and Kushiyama gave the loan proceeds to Boulware.

The defense case was that Boulware did not underreport income in any of the relevant tax years, because HIE maintained beneficial ownership of all of the funds in question. Even if he did underreport his income, he at all times acted in good-faith reliance on the advice of counsel.

According to Boulware, he intended to use most of the money at issue in this case to buy out his wife's marital interest in HIE and the money was therefore not, or at least arguably not, taxable to him. He asked his wife for a divorce in 1987, and she threatened to force him to liquidate HIE unless he agreed to give her $5 million and a $1 million house. Boulware and his wife realized that it would take time for HIE to buy out her interest. When he told Jin Sook Lee about the agreement, she asked to hold the money as it was accumulating, because she wanted to make sure he saved it for the divorce. His lawyer advised him that (1) his wife had a right to half of the company as her marital share of HIE, and (2) if Lee held the funds in trust for HIE, the money would not be taxable to Boulware.

Boulware testified that by 1994 he had collected enough HIE money to redeem his wife's share of the company and finalize their divorce. Lee, however, refused to return the money. For this reason, Boulware had to scramble to obtain other funds to buy out his wife's marital interest. For example, he received a $1.7 million loan from Harold Okimoto. Finally in 1997, a Hawaii state-court jury found that the money Lee was holding belonged to HIE. The state court ordered Lee to return the money to HIE.

The defense also tried to show that, despite Boulware's success as an entrepreneur, he was a relatively unsophisticated person who neither understood nor paid attention to accounting issues. A certain disregard of corporate formalities was also due

to the fact that he owned and ran the company. In addition, the nature of his business (*e.g.*, purchasing coffee beans in cash from growers on Kona) required that he receive corporate advances to make deals. He always informed his comptroller Merwyn Manago of these transactions, and they were (or Boulware was under the impression that they were) reported on HIE's books and tax returns.

With regard to the GECC loans, the defense made a case that the transactions were not fraudulent. What the government portrayed as false invoices were really legitimate appraisals of the video game machines, which were to serve as collateral for a loan from GECC to HIE.

III

A. Exclusion of the State-Court Judgment

Boulware argues that the district court improperly excluded evidence of a Hawaii civil judgment, which determined that HIE owned the money that Boulware had given to Jin Sook Lee between 1987 and 1994. As the state court found that Boulware had not gifted the funds to Lee and that the funds belonged to HIE, he contends that he had no federal tax liability for those funds. He argues that the improper exclusion of this evidence violated his due process right to present evidence in his defense.

1. Standard of Review

We generally review a district court's evidentiary rulings for abuse of discretion. *United States v. Sua*, 307 F.3d 1150, 1152 (9th Cir. 2002), *cert. denied*, 537 U.S. 1221 (2003). Under this standard, reversal is appropriate only where the trial court made an error of law or a clearly erroneous finding of fact, or where the reviewing court has "'a definite and firm conviction that the district court committed a clear error of judgment.'" *United States v. Finley*, 301 F.3d 1000, 1007 (9th Cir. 2002) (quoting *United States v. Benavidez-Benavidez*, 217 F.3d 720, 723 (9th Cir. 2000)). We review de novo the district court's interpretations of the Federal Rules of Evidence. *United States v. Angwin*, 271 F.3d 786, 798 (9th Cir. 2001).

2. Factual Background

On October 7, 1994, over a year after Boulware became aware that the IRS was investigating him, but four-and-a-half years before he was indicted, Jin Sook Lee filed a complaint for conversion, breach of contract, and unjust enrichment against Boulware and HIE in Hawaii state court. In the complaint, Lee alleged that Boulware, individually and as an agent of HIE, had taken $840,000 in cash from a safe in her home, had wrongfully acquired a real property belonging to her, and had defaulted on a $1.2 million note. She sought compensatory and punitive damages.

On November 17, 1994, Boulware and HIE answered Lee's complaint and denied all the relevant allegations. Boulware and HIE also filed a counterclaim against Lee for breach of contract, breach of fiduciary duty, unjust enrichment, constructive trust, conversion, quiet title, accounting, declaratory relief, cancellation of instruments, and compensatory and punitive damages.

In Boulware and HIE's counterclaim, they alleged the following facts regarding the payments to Lee:

> 5. In 1987, Boulware was married to Mal Sun Boulware. At that time, due to irreconcilable differences, Michael Boulware and Mal Sun Boulware agreed that they would get divorced because their marriage was beyond redemption. Boulware understood and realized that division of the marital property would require substantial sums of cash and properties in order to satisfy his wife's demands. Boulware wanted to insure that he would not have to sell [HIE] as a result of the divorce. Boulware advised Lee that he and his wife had decided to divorce and advised her of the parties' property division discussions and agreements and that such agreements would require the payment of substantial sums in cash and properties. . . .
>
> 6. Commencing in or about 1987 [HIE] advanced monies from time to time to Boulware pursuant to oral and written understandings and debt instruments whereby

> Boulware agreed to account for and repay all such monies not properly accounted for as business expenditures incurred on behalf of the company. Commencing in or about 1987 and continuing through approximately 1993, Boulware transferred directly to Lee, or caused [HIE] to deliver to Lee, certain monies pursuant to the oral and written understandings referenced above. At all times, Lee understood and agreed that all such funds not used by Boulware and Lee for purposes of advancing the business interests of [HIE], had to be repaid in full to Boulware and [HIE]. Lee further understood and agreed that a portion of the funds paid back by her would be used to satisfy the property settlement agreements between Boulware and his then wife Mal Sun Boulware.
>
> * * *
>
> 22. At all times relevant herein, a confidential relationship existed between Lee and Counterclaimaints. Based upon and arising out of said confidential relationship, Counterclaimants transferred to Lee monies and properties valued in excess of $5 million. Lee promised to hold said assets for the benefit of [HIE] and to prevent their dissipation and to reconvey them to Counterclaimants upon demand. . . .

Boulware and HIE sought a declaration that the transfers to Lee were not gifts.

After a trial on the merits, the jury found that the monies were not gifts and that the monies

belonged to HIE. The relevant question on the special verdict form read, as follows:

> *Question No. 10.* Jin Sook Lee claims the cash and checks delivered to her, during the period from March, 1987 to May, 1994, by Michael Boulware and Hawaiian Isles Enterprises were gifts. Michael Boulware and Hawaiian Isles Enterprises claim the monies were not gifts but were to be held by Jin Sook Lee and to be returned when requested. State your findings below:
>
> The monies were gifts to Jin Sook Lee Yes _____ No ✓
>
> The monies belong to Hawaiian Isle Enterprises Yes ✓ No _____

Likewise, in deciding the equitable issues of unjust enrichment and constructive trust, the state court judge found by clear and convincing evidence that the monies were not gifts to Lee. The judgment provides in relevant part:

> As to Counts I, III, IV and V, judgment in favor of Defendant/Counterclaimant HAWAIIAN ISLES ENTERPRISES, INC. and against Plaintiff [Lee] in the amount of $4,551,931.00, said amount being the property of Defendant/Counterclaimant HAWAIIAN ISLES ENTERPRISES, INC. which has been and is being held in constructive trust by Plaintiff and by which Plaintiff has been and is being unjustly enriched[.]

In this case, Boulware moved to adopt as controlling the state court's determination that the money belonged at all times to HIE and was therefore not taxable to him. The district court denied the motion on the ground that the jury only determined ownership of the money as between Lee and HIE, and was not asked to determine ownership as between HIE and Boulware.

Boulware then filed a motion in limine to preclude the government from referring to the monies transferred to Lee as gifts, a factual issue that had been subject to adversarial testing in the state court, or alternatively to allow the introduction of the state court judgment to rebut the government's gift theory. The government in turn filed a motion in limine to exclude introduction of the state court judgment on four grounds: (1) the judgment had no preclusive effect, because the United States was not a party to the state action; (2) the state court judgment was not relevant, because it determined ownership of the moneys only as between Lee and HIE and so was not inconsistent with the theory that the money was reportable income to Boulware; (3) the judgment was unreliable, and admitting the judgment would confuse the jury and would lead to a mini-trial to show the deficiencies in the evidence considered in the state case; and (4) the judgment was inadmissible hearsay.

In Boulware's opposition to the government's motion in limine, he argued that collateral estoppel is not the issue. Rather, as a determination of property

rights, the state court judgment has preclusive effect for purposes of determining whether he had a federal tax liability. In addition, the state court judgment was relevant to the issue of whether he gifted money to Lee and thereby diverted HIE money for personal purposes. The judgement would also allow him to argue that his failure to amend his tax returns was in good-faith reliance on the state court judgment. He further argued that the district court did not have jurisdiction to question the reliability of the state court judgment absent a showing of collusion. Finally, Boulware argued that the judgment was admissible as a record of property rights under Federal Rule of Evidence 803(14), and that its probative value far outweighed any danger of unfair prejudice, confusion of the issues, or waste of time.

The district court granted both motions, explaining that "the characterization of this transfer as a gift is not relevant to the ultimate issues of the case" and that the jury should decide the case based on the testimony of the witnesses. The court ruled that no witnesses should discuss the state court judgment, but that he would leave the matter open to reconsideration.

At trial, the government at times suggested to the jury that Boulware gave the money to Lee as a gift, arguing, for example, that Boulware spent the money "to support a lifestyle of a Porsche, a Blazer, a Mercedes; enough of a lifestyle to support an estate in Kahala; support both a wife and a girlfriend, both of whom received millions of dollars. . . ." At other times,

however, the government argued that Boulware gave the money to Lee to hide it from the IRS, to hide it from his wife, or to use HIE money to pay off his own obligation to his ex-wife, arguing, for example, that Boulware took the money so that he "could dump his wife without paying a dime." The court sustained the government's objections to questions about the judgment. Boulware himself testified without objection, however, that he ended up in a lawsuit with Lee to force her to return the money, and that she was forced to return $5 million or $6 million to HIE.

3. Analysis

a. *Does the State Judgment Have Preclusive Effect?*

Boulware argues that the state court judgment precluded the government from relitigating the ownership of the funds he delivered to Lee. He bases his argument not on the affirmative defense of collateral estoppel, because the government was not a party to the state lawsuit, but rather on the principle that state law determines the property rights to which federal law attaches tax consequences. Because the state court jury found that Boulware had not gifted the funds to Lee and that the funds belonged to HIE, he argues that he had no federal tax liability for those funds. We disagree.

Boulware relies on cases such as *Freuler v. Helvering*, 291 U.S. 35 (1934), *Blair v. Comm'r*, 300 U.S. 5 (1937), and *Flitcroft v. Comm'r*, 328 F.2d 449

(9th Cir. 1964). These tax cases stand for the proposition that federal courts must treat as binding state court determinations on questions of state law as long as the judgments were not obtained through collusion. In *Flitcroft,* for example, the question was whether the retroactive reformation of a trust by a state court could wipe out a federal tax liability for previous years. *Id.* at 453. We held that the state court proceeding was not collusive and therefore "the adjudication of the state court is given effect, 'not because it is res judicata against the United States, but because it is conclusive of the parties' property rights which alone are to be taxed.'" *Id.* at 459 (quoting *Gallagher v. Smith,* 223 F.2d 218 (3d Cir. 1955)).

These authorities, however, have somewhat been called into question by the Supreme Court's 1967 decision in *Commissioner v. Bosch,* 387 U.S. 456 (1967). There, the Court held that "where the federal estate tax liability turns upon the character of a property interest held and transferred by the decedent under state law, federal authorities are not bound by the determination made of such property interest by a state trial court." *Id.* at 457; *see also id.* at 465 ("[W]hen the application of a federal statute is involved, the decision of a state trial court as to an underlying issue of state law should *a fortiori* not be controlling"). *Bosch* is distinguishable, however, because it dealt with the federal estate tax statute, and the Court appeared to give great weight to a statement in the legislative history that "'proper regard,'

not finality, 'should be given to interpretations of the will' by state courts and then only when entered by a court 'in a bona fide adversary proceeding.'" *Id.* at 463-64.

It is clear, therefore, that with regard to the calculation of estate taxes, federal courts are not bound by the judgments of a state probate court. *See, e.g., Estate of Rapp v. Comm'r,* 140 F.3d 1211, 1215-16 (9th Cir. 1998). What effect, if any, *Bosch* has outside the context of the estate tax statute is unclear. The Fifth Circuit has held that "[t]he relevance of a state court's judgment to the resolution of a federal tax question will vary, depending on the particular tax statute involved as well as the nature of the state proceeding that produced the judgment." *Estate of Warren v. Comm'r,* 981 F.2d 776, 781 (5th Cir. 1993) (quoting *Brown v. United States,* 890 F.2d 1329, 1342 (5th Cir. 1989)).

Supreme Court precedent pre- and post-*Bosch* suggests that its holding does not apply outside of the estate-tax context. In *Aquilino v. United States,* 363 U.S. 509 (1960), the Court made the following observation:

> It is suggested that the definition of the taxpayer's property interests should be governed by federal law, although supplying the content of this nebulous body of federal law would apparently be left for future decisions. We think that this approach is unsound because it ignores the long-established role that the States have played in creating property

> interests and places upon the courts the task of attempting to ascertain a taxpayer's property rights under an undefined rule of federal law. It would indeed be anomalous to say that the taxpayer's "property and rights to property" included property in which, under the relevant state law, he had no property interest at all.

Id. at 513 n.3. More recently, in *United States v. Craft*, 535 U.S. 274 (2002), the Court held that "[s]tate law determines only which sticks are in a person's bundle. Whether those sticks qualify as 'property' for purposes of the federal tax lien statute is a question of federal law." *Id.* at 278-79; *see also Pahl v. Comm'r*, 150 F.3d 1124, 1128 (9th Cir. 1998) (holding that "we look to federal law to determine what interest creates tax liability. We look, however, to state law to determine whether the taxpayer has the requisite interest.").

Even assuming that the state court judgment is binding as to the ownership of the funds, the question becomes what the state court judgment determined. At a minimum, the state court determined that the money Boulware transferred to Lee was not a gift. The money could still be income to Boulware, however, if he gave it to Lee to hold for him in an effort to hide it from the IRS. *See Chism v. Comm'r*, 322 F.2d 956, 959-60 (9th Cir. 1963) (holding that the tax court did not err in refusing to be bound by a state court determination that withdrawals from a closely-held corporation were loans and not dividends, because "it

is not the existence of a legal obligation to repay that is controlling"; rather, whether a withdrawal is a loan "is a factual question 'to be determined upon consideration of all the circumstances present in a particular case, and depends upon the existence of an intent at the time the withdrawal is made that it should be paid back.'" (quoting *Clark v. Comm'r*, 266 F.2d 698, 710-11 (9th Cir. 1959))).

Boulware argues that the state court finding that Lee was holding the money in trust for HIE is also binding. The state court did find that the money in question belonged to HIE and that Lee had been and was holding it in "constructive trust" for HIE. On the other hand, although the record from the state court action is not part of the record on appeal, the ownership of the money as between Boulware and HIE does not appear to have been subject to adversarial testing. The special verdict form asked the jury to determine ownership only as between Lee and HIE, presumably because Boulware never claimed the money was his. If Lee maintained that she had received the money as a gift, and Boulware contended that he had given her the money to hold in trust for HIE, there would have been no reason to ask the jury if Boulware owned the money, because it was not an issue in the lawsuit.

For these reasons, we hold that the district court did not err in ruling that the state court judgment does not have preclusive effect as to the ownership of the monies.

b. *Was the State-Court Judgment Admissible Evidence?*

(1) *Relevance*

Even though the state court judgment did not have preclusive effect, the question still remains whether it was admissible evidence that the district court improperly excluded. The district court excluded the state court judgment pursuant to Federal Rules of Evidence 401 and 402, stating that whether the transfers to Lee were gifts "is not relevant to the ultimate issues of the case." This ruling was erroneous. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. Whether Boulware transferred the HIE funds to Lee for personal purposes or for her to hold in trust for HIE was a key issue in the case. That he pursued a successful litigation against Lee to force her to return the monies to HIE has some tendency to make it more likely that he gave the monies to her to hold in trust. Indeed, the government conceded at oral argument that the state court judgment is relevant.[3]

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[3] The dissent's argument that the judgment "does not prove, or even tend to prove" that Boulware did not siphon off the money from HIE is mistaken, both legally and factually. For evidence to be relevant, and thus admissible, Rule 401 does not require that it "prove" anything. Rule 401's only requirement is that the proffered evidence have a *tendency* to prove a fact in

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(2) *Hearsay*

Hearsay is "a statement other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Fed. R. Evid. 801(c). A prior judgment is therefore hearsay to the extent that it is offered to prove the truth of the matters asserted in the judgment. A prior judgment is not hearsay, however, to the extent that it is offered as legally operative verbal conduct that determined the rights and duties of the parties. *See United States v. Pang,* 362 F.3d 1187, 1192 (9th Cir. 2004). Although Rule 803 contains exceptions for certain kinds of judgments, such as judgments of previous felony convictions and judgments as to personal, family, or general history or boundaries, *see* Fed. R. Evid. 803(22) & (23), civil judgments do not fit comfortably into any hearsay exception.[4]

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issue and the judgment certainly has *some* tendency to make Boulware's explanation (that he gave the money to Lee to hold in trust for HIE) more probable and the government's theory of the case (that he simply gave the money to Lee) less probable. Rule 401 requires no more.

[4] Certain kinds of judgments fall under statutory or common law exceptions. *See, e.g.,* 15 U.S.C. § 16(a) (providing that "[a] final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws as to all

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Boulware argues that the state court judgment fits the exceptions set forth in Rule 803(14) and (15). The first of these exceptions concerns records of documents that affect an interest in property, and reads as follows:

> **Records of documents affecting an interest in property.** The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.

Fed. R. Evid. 803(14).

In *United States v. Perry,* 857 F.2d 1346 (9th Cir. 1988), a criminal tax prosecution, the government introduced testimony regarding a bankruptcy court's determination that certain transfers of property were fraudulent conveyances. *Id.* at 1351. We held that admission of the testimony was not plain error:

> The challenged testimony was not, as Perry urges, offered as substantive proof of a fraudulent scheme. A review of the record shows that the testimony was offered only to show that Perry was the true owner of certain properties nominally owned by his

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matters respecting which said judgment or decree would be an estoppel as between the parties thereto").

> relatives. *See Greycas, Inc. v. Proud,* 826 F.2d 1560, 1567 (7th Cir. 1987) . . . ("a judgment, insofar as it fixes property rights, should be admissible as the official record of such rights, just like other documents of title"). This evidence, in turn, was relevant to prove that Perry had concealed his assets. From it, the jury could infer that Perry had intended to evade federal income taxes, charges for which he was on trial.

Id. at 1351-52 (footnote and ending citation omitted). Similarly, in *Greycas, Inc. v. Proud,* 826 F.2d 1560 (7th Cir. 1987), a case on which *Perry* relied, the Seventh Circuit noted that the state court judgment at issue in the case should be admissible under Rule 803(14) to show the priority of liens, "fix[ing] Greycas's rights, equivalent to title, in Crawford's farm machinery." *Id.* at 1567 (citing Rule 803(14)).

Thus, *Perry* supports the proposition that a previous judgment is admissible under Rule 803(14) to show the ownership of assets. To the extent that Boulware offered the judgment simply for the purpose of establishing HIE's ownership of the funds in 1997 and Lee's legal obligation to return those funds, he was offering the judgment not for the truth of the matters asserted in the judgment, but rather to establish the judgment's legal effect. As this is a non-hearsay purpose, we see no need to resort to the hearsay exception set forth in Rule 803(14).

Moreover, to the extent that Boulware offered the judgment for the truth of the matters asserted – to

establish that he had not gifted the funds to Lee and that she was and had been holding them in constructive trust for HIE – the judgment meets the exception set forth in Rule 803(15):

> **Statements in documents affecting an interest in property.** A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

The Federal Rules of Evidence are an act of Congress, and we must therefore interpret Rule 803(15) as we would a statute, *see Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 587 (1993), in accordance with its plain meaning, *see Bourjaily v. United States*, 483 U.S. 171, 178-79 (1987) (interpreting Rule 104 in accordance with its plain meaning); *see also Garcia v. United States*, 469 U.S. 70, 75 (1984) (noting that "only the most extraordinary showing of contrary intentions from [the legislative history] would justify a limitation on the 'plain meaning' of the statutory language").

Under the plain meaning of Rule 803(15), hearsay statements are admissible if they are contained within a document that affects an interest in property, if the statements are relevant to the purport of the document, and if dealings with the property since the document was made have not been inconsistent

with the truth of the statements. *See Silverstein v. Chase,* 260 F.3d 142, 149 (2d Cir. 2001). Here, the state court judgment meets each of these requirements. The judgment affected an interest in property by declaring HIE to be the legal owner of the funds and by requiring Lee to return them to HIE, and the statements are relevant to the purport of the document. In addition, there is no indication that the parties acted inconsistently with the judgment; it was undisputed that the judgment was valid and could be authenticated.

The legislative history is not clearly to the contrary. The Advisory Committee's note to Rule 803(15) explains that "[d]ispositive documents often contain recitals of fact" and that "[u]nder the rule, these recitals are exempted from the hearsay rule." Although the note uses the example of a deed, a judgment that establishes the ownership of disputed items of property is no less of a dispositive document, and the judgment's recital of facts is no less exempt from the hearsay rule. For these reasons, we hold that the state court judgment was admissible under Rule 803(15) as a document that affected an interest in property.

Finally, the district court excluded on relevance grounds not only the state court judgment and testimony about the judgment, but also testimony about the underlying lawsuit between Lee and Boulware. For example, the court would not allow Boulware's tax attorney to testify about the lawsuit for the nonhearsay purpose explaining why he had advised

Boulware not to list the monies transferred to Lee as income. For all of the reasons discussed above, the hearsay rule did not prohibit Boulware from introducing the state court judgment or testimony about the underlying lawsuit.

(3) *Rule 403*

In its motion in limine to exclude the state court judgment, the government argued that the judgment was unreliable, and admitting the judgment would confuse the jury and would lead to a mini-trial to show the deficiencies in the evidence considered in the state case.

At a minimum, the state court's finding that HIE owned the money in 1997 was relevant to show that HIE had owned the money all along and to rebut the government's suggestions that Boulware had concocted the whole "Lee as trustee" story to defend himself in the criminal prosecution.[5] Any danger that the jury would have given undue weight to the state court judgment could have been dealt with by a cautionary instruction. Likewise, even if introduction of the judgment would have led the prosecution to cross-examine witnesses about deficiencies in the evidence heard by the state court jury, the trial judge should easily have been able to control any waste of

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[5] The prosecutor argued, for example, that there was no evidence that Boulware owed his wife anything "except in the rather fertile imagination of [his counsel]."

time or confusion of the issues, so that admission of the state court judgment would not have substantially outweighed the probative value of the evidence.[6]

(4) *Harmless Error*

Although it was error to exclude the state court judgment, the error is not reversible if it was harmless. If the error amounts to a constitutional violation, we apply the "harmless beyond a reasonable doubt" standard. *See Chapman v. California,* 386 U.S. 18, 24 (1967).

"[N]ot every hearsay error amounts to a constitutional violation. At a minimum, a defendant must demonstrate that the excluded evidence was important to his defense." *United States v. Lopez-Alvarez,* 970 F.2d 583, 588 (9th Cir. 1992); *see also United States v. Saenz,* 179 F.3d 686, 689 (9th Cir. 1999) (holding that "[e]rror cannot be harmless where it prevents the defendant from providing an evidentiary basis for his defense"). Here, the state-court

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[6] The dissent "would hold that the district court did not abuse its discretion in ruling the Hawaiian judgment inadmissible," based on its belief that the district court conducted an "[i]mplicit . . . evaluation of probative value." The district court, however, did not perform a Rule 403 balancing analysis; rather, it simply held that the evidence was "not relevant to the ultimate issues of the case" and granted the government's motion to exclude the judgment "pursuant to Rules 401 and 402 of the Federal Rules of Evidence." We therefore review de novo, rather than for abuse of discretion, whether the judgment was properly excludable under Rule 403.

judgment was crucial to Boulware's defense on the tax counts, and the judgment directly contradicted the government's theory of the case. The district court's exclusion of the judgment denied Boulware "a meaningful opportunity to present a complete defense," *Lopez-Alvarez,* 970 F.2d at 587-88, and thus violated his due process rights. We must therefore reverse unless the error was harmless beyond a reasonable doubt.

The government argues that the error was harmless because Boulware himself testified on direct examination about the judgment.[7] Boulware makes

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[7] Boulware's testimony on this subject was as follows:

Q. So, during that time period, in the spring of '94, after you got your divorce, did Jin Sook Lee agree to return the company's money to HIE?

A. No.

Q. Did you end up in lawsuits with Jin Sook Lee to force her to return the money?

A. Yes.

Q. And then approximately in 1997, was Jin Sook Lee forced to return money to the company?

A. Yes.

Q. Approximately how much?

A. Five, six million.

Q. I'm sorry?

A. Five, six million.

Q. But during the time period from 1994 to '97, the company didn't receive its money back from Jin Sook Lee, did it?

A. No.

the point, however, that he was the least effective witness to testify about the judgment because of his perceived self-interest and bias. In addition, although he called witnesses who testified that HIE at all times owned the funds that he transferred to Lee and that he relied in good faith on the advice of his lawyer and accountants in not reporting the funds on his tax returns, he points out that the prosecution sharply attacked the credibility of these witnesses, and the judgment would have been key corroborative evidence.

Another reason the exclusion of the state court judgment may have been harmless is that Boulware's story was somewhat implausible. Rather than setting up a formal arrangement by which money would be held in trust to buy out his wife's interest in HIE, Boulware gave corporate money to his girlfriend. In addition, he transferred the money to her in a series of shady transactions. Rather than putting the cash in a bank account so that it could earn interest, Lee held the cash in a safe in their home. Finally, Boulware did not sue Lee for a return of the funds until she sued him.

Nevertheless, the beneficial ownership of the funds that Boulware transferred to Lee was central to the entire case against him, and the government did not call Lee or any other witness to rebut Boulware's claim that he gave the money to her to hold in trust

for the purchase of his ex-wife's marital interest.[8] Boulware's attorney Michael McCarthy testified that in 1987 Boulware retained him to establish a trust for Boulware and Lee's nonmarital son, Glenn Lee Boulware. Half of the shares of HIE were put into the trust. McCarthy advised Boulware that Lee, as the trustee of a trust that held a 50% ownership interest in HIE, would be a constructive trustee of any assets she received that belonged to HIE. He advised Boulware that any HIE property given to Lee would continue to belong to HIE, and would never belong to Lee or Boulware.

In the end, we are not convinced beyond a reasonable doubt that the jury would have arrived at the same verdict had testimony regarding the state court judgment and the judgment itself not been excluded. We therefore reverse Boulware's convictions on all of the tax evasion and false tax return counts and remand for a new trial.

B. Sufficiency of the Evidence

Boulware also contends that we must reverse his convictions for filing false tax returns and tax evasion because the government failed to prove that he

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[8] The government did call Boulware's ex-wife, Mal Sun Boulware, to the stand, but she did not necessarily help the government's case. On cross-examination, she confirmed that when Boulware asked her for a divorce in 1987, she demanded $5 million and a $1 million house because she believed she had an ownership interest in HIE.

underreported his income. Although we reverse Boulware's conviction, we must still consider his contention that the evidence was insufficient to sustain his conviction, because a challenge to the sufficiency of the evidence implicates a defendant's rights under the Double Jeopardy Clause. *See United States v. Recio,* 371 F.3d 1093, 1104 (9th Cir. 2004); *United States v. Gergen,* 172 F.3d 719, 724-25 (9th Cir. 1999).

1. Standard of Review

Where, as here, the defendant made timely motions for acquittal, we review his insufficiency of the evidence claim de novo. *United States v. Odom,* 329 F.3d 1032, 1034 (9th Cir. 2003). We will deny the claim if, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the elements of the crime proved beyond a reasonable doubt. *Id.*

2. Analysis

Boulware was convicted on counts 1-5 of filing false tax returns in violation of 26 U.S.C. § 7206(1) for the 1989-1993 tax years. He was also convicted on renumbered counts 6-9 of tax evasion in violation of 26 U.S.C. § 7201 for the 1994-1997 tax years.

The elements of the offense of filing false tax returns under § 7206(1) are as follows:

> (1) the defendant made and subscribed a return, statement, or other document that

> was incorrect as to a material matter; (2) the return, statement, or other document subscribed by the defendant contained a written declaration that it was made under the penalties of perjury; (3) the defendant did not believe the return, statement, or other document to be true and correct as to every material matter; and (4) the defendant falsely subscribed to the return, statement, or other document willfully, with the specific intent to violate the law.

United States v. Marabelles, 724 F.2d 1374, 1380 (9th Cir. 1984). The elements of tax evasion under § 7201 are "(1) the existence of a tax deficiency, (2) willfulness in attempted evasion of taxes, and (3) an affirmative act constituting an evasion or attempted evasion." *Id.* at 1377-78.

Boulware's convictions under §§ 7206(1) and 7201 hinge on the fact that he diverted funds from HIE but did not report them as income on his personal income tax returns. Boulware argues that although he controlled the funds in question, the government introduced no evidence that this control was inconsistent with ownership of the funds by HIE. Although the government argued to the jury that Boulware "stole" the money from HIE, the government did not establish any of the required elements of theft under Hawaii law. Finally, he argues, the diversions could not have constituted taxable constructive dividends, because HIE had no positive earnings or profits during the years charged in the indictment.

The sufficiency of the evidence issue boils down to whether the government could have proved the elements of §§ 7206(1) and 7201 beyond a reasonable doubt without proving either that Boulware stole the funds from HIE or that the funds were not loans or nontaxable returns of capital. *United States v. Miller*, 545 F.2d 1204 (9th Cir. 1976), indicates that the answer to this question is "yes."

Miller, like this case, concerned the characterization of funds that a taxpayer diverted from his closely-held corporation. *Id.* at 1211. The defendant argued that his conviction for tax evasion could not stand, because the government had not proved that his corporation had any earnings and profits during the years in question. *Id.* at 1210. Therefore, his diversions must be treated as a return of capital. *Id.* at 1210-11. The court rejected this argument, stating that "[i]n a criminal tax proceeding the concern is not over the type or the specific amount of the tax which the defendant has evaded, but whether he has willfully attempted to evade the payment or assessment of a tax." *Id.* at 1214. The court also held that the defendant had the burden of going forward once the government "demonstrates that the taxpayer had unexplained funds which *could be considered* as income which the taxpayer fails to report in his return." *Id.* at 1215 & n.13 (emphasis added).

Boulware counters that the government did not make out a prima facie case on the false tax return and tax evasion counts because it used a bank-deposits method of proof and failed to investigate leads that

were reasonably susceptible of being checked. In particular, HIE's comptroller testified to the grand jury that HIE had fully reported the $10.2 million at issue and submitted records in support of this contention. In addition, the government knew of a bankruptcy action in which the court affirmed the trustee's determination that assets held by Lee belonged to HIE.

The theory behind the bank-deposits method of proof was described long ago, as follows:

> [I]f it be shown that a man has a business or calling of a lucrative nature and is constantly, day by day and month by month, receiving moneys and depositing them to his account and checking against them for his own uses, there is most potent testimony that he has income, and, if the amount exceeds exemptions and deductions, that the income is taxable.

Gleckman v. United States, 80 F.2d 394, 399 (8th Cir. 1935) (quoted in 2 Kenneth E. North, *Criminal Tax Fraud* § 23.41, at 405 (3d ed. 1998)). When using the bank-deposits method of proof, the government must conduct an adequate and full investigation to remove non-income deposits, such as transfers between bank accounts. *United States v. Stone,* 770 F.2d 842, 844 (9th Cir. 1985). "The critical question is whether the government's investigation has provided sufficient evidence to support an inference that an unexplained excess in bank deposits is attributable to taxable income." *Id.* at 844-45. Although the government must be especially thorough in its investigation and

presentation, "it is well settled that the government is not obliged to prove the exact amount of a deficiency so long as the taxpayer's understatement of income is substantial." *Id.* at 845.

Here, the government witness who performed the bank-deposits analysis, Jerry Yamachika, testified that he "eliminated . . . any loans that may have come – that Mr. Boulware might have gotten from his company. . . ." On cross-examination, Yamachika testified that he credited Boulware with deductions for money in the bank accounts that was used to buy coffee, and that "an analysis was done as to what credit he was given on his loan account at the corporation to reduce his loan for the purchases he made." Based on the testimony at trial, "[t]he evidence was more than adequate to support the inference that the defendant's bank deposits were income from [HIE] and were in fact currently taxable but unreported income." *Id.* at 845.

Boulware argues that even if the government did make out a prima facie case, he met his burden of going forward with the evidence by testifying that the diversions were loans and were accounted for as such on HIE's books. This put the burden back on the government to prove the deposits were not loans. The nature of the transactions, however, was sufficient evidence for a rational juror to conclude beyond a reasonable doubt that the deposits were not loans.

We conclude that there was ample evidence from which a rational juror could have concluded that

Boulware was guilty of willfully submitting false tax returns for the 1989-1993 tax years and of willfully evading taxes for the 1994-1997 tax years.

C. Other Asserted Trial Errors

Boulware further contends that his conviction should be reversed because of a number of asserted trial errors, including constructive amendment of the indictment by the prosecutor and prosecutorial misconduct. Most of these errors, however, were not objected to at trial; therefore, we would review them under the plain error rule of Fed. R. Crim. P. 52(b). *See, e.g. United States v. Dipentino,* 242 F.3d 1090, 1094 (9th Cir. 2001). We see no useful purpose in reviewing these asserted errors. First, a ruling under plain error review will give the district court little assistance on retrial on how it should rule if a timely objection is made. Second, we will not assume that any trial error is likely to be repeated in a retrial.

We briefly address Boulware's Confrontation Clause claim, however, because it relates directly to his conviction for conspiracy to make false statements to a federally-insured financial institution. Boulware contends that the district court violated his rights under the Confrontation Clause by limiting his cross-examination of Lorin Kushiyama, his alleged co-conspirator on count 10. Whether limitations on cross-examination violate the Confrontation Clause is a question that we review de novo. *United States v. Adamson,* 291 F.3d 606, 612 (9th Cir. 2002).

Boulware argues that the district court would not allow him to cross-examine Kushiyama about whether he agreed with Boulware to submit fraudulent invoices, an essential element of the conspiracy charge. The district court sustained a string of objections on relevance grounds to questions regarding whether Kushiyama had prepared invoices or appraisals for *other parties*. When defense counsel asked Kushiyama "As far as these invoices, you are not the – intending to submit fake invoices to anyone, were you?," the judge sustained the government's objection and defense counsel did not pursue the matter further.

Although it is not completely clear whether "these invoices" referred to those prepared for Boulware or to ones prepared for other customers, the court was obviously under the impression that they referred to invoices for other parties and defense counsel did nothing to disabuse him of this impression. Defense counsel did not reword the question, explain to the court that he was inquiring about the invoices at issue in this case, or call Kushiyama as a defense witness.

For these reasons, the limitation on the cross-examination of Kushiyama was not so severe as to amount to a violation of Boulware's Confrontation Clause rights.

D. Sentencing Issues

Among other sentencing issues, Boulware contends that the district court erred in its calculation of

the tax loss attributed to his offense, including the court's failure to hold an evidentiary hearing. In its cross-appeal the government contends that the district court erred in declining to enhance Boulware's sentence for obstruction of justice. Given our reversal and remand for a new trial on the tax counts, no purpose would be served by our review of the sentencing issues.

Sentence was imposed in this case well before *Blakely v. Washington,* 124 S.Ct. 2531 (2004), wrought a sea change in sentencing, and *United States v. Ameline,* 376 F.3d 967 (9th Cir. 2004), held that *Blakely* was applicable to certain aspects of sentencing under the U.S. Sentencing Guidelines.[9] Under these circumstances, because we are reversing and remanding for a new trial on most counts, in the event there is a conviction (and in any event on the remaining, unreversed count) when the district court resentences Boulware, it will be under the then extant post-*Blakely* regime.

We must, however, address Boulware's challenge to the district court's forfeiture order, because we affirm his conviction for conspiracy to make false statements to a federally insured financial institution

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[9] The Supreme Court has granted certiorari in two cases, *United States v. Booker,* 2004 WL 1713654 (U.S. Aug. 2, 2004), and *United States v. Fanfan,* 2004 WL 1713655 (U.S. Aug. 2, 2004), which present the question of *Blakely's* application to the U.S. Sentencing Guidelines.

and because Boulware waived his right to a jury determination of the forfeiture issue.

Boulware argues that the district court's forfeiture order was erroneous, because it did not give him credit for funds he returned to the lender. The jury convicted Boulware of renumbered count 10 of the indictment, conspiracy to make false statements to a federally-insured financial institution, but acquitted him of the substantive charges (counts 11-14). Renumbered count 15 of the indictment charged that Boulware shall forfeit proceeds that he obtained directly or indirectly as a result of the offenses charged in counts 10-14.

18 U.S.C. § 982(a)(2) provides:

> The court, in imposing sentence on a person convicted of a violation of, or a conspiracy to violate –
>
> (A) section . . . 1014 . . . of this title, affecting a financial institution . . .
>
> * * *
>
> shall order that the person forfeit to the United States any property constituting, or derived from, proceeds the person obtained directly or indirectly, as the result of such violation.

Nothing in the text of the statute entitles Boulware to a set-off for loan proceeds that he repaid to GECC. In fact, § 982(b)(1) incorporates the provisions of 21 U.S.C. § 853(c), which provides that

"[a]ll right, title, and interest in property described in subsection (a) of this section vests in the United States upon the commission of the act giving rise to forfeiture under this section." Finally, that defendants may be required to pay restitution and forfeit the same amounts indicates that Boulware is not entitled to receive a credit for funds he returned. *Cf. United States v. Bright,* 353 F.3d 1114, 1125 (9th Cir. 2004) (holding that forfeited funds need not be applied toward restitution); *United States v. Feldman,* 853 F.2d 648, 663-64 (9th Cir. 1988) (holding that the sentencing option of ordering restitution "is not denied to the district court because a defendant must also forfeit the proceeds of illegal activity").

The district court did not err in failing to reduce the amount of the forfeiture. The criminal forfeiture statute contains nothing comparable to the civil forfeiture statute's provision that "[i]n cases involving fraud in the process of obtaining a loan or extension of credit, the court shall allow the claimant a deduction from the forfeiture to the extent that the loan was repaid, or the debt was satisfied, without any financial loss to the victim," Civil Asset Forfeiture Reform Act of 2000, Pub. L. 106-185, 114 Stat. 202, § 20(b), *codified at* 18 U.S.C. § 981(a)(2)(C).

IV

We reverse Boulware's conviction for tax evasion and filing false tax returns and affirm his conviction for conspiracy to make false statements to a

federally-insured financial institution. We vacate his sentence on the false statement count and remand for further proceedings consistent with this opinion.

AFFIRMED in part, REVERSED in part, and REMANDED.

SILVERMAN, Circuit Judge, dissenting:

In my view, the district court did not abuse its discretion in refusing to admit the state court judgment into evidence. The judgment does no more than establish that, as between Jin Sook Lee and Hawaiian Isles Enterprises, the money belonged to Hawaiian Isles Enterprises. This has no bearing on whether Boulware diverted corporate funds to his girlfriend for his own benefit without paying tax on the money. The judgment establishes only that *she* was not entitled to keep the cash. It does not prove, or even tend to prove, that *he* didn't siphon off the money from the corporation, tax-free. Why would it? That was not at issue in the case.

District courts have wide latitude in ruling on the relevancy of evidence. *United States v. Alvarez*, 358 F.3d 1194, 1216 (9th Cir. 2004). Implicit in any such ruling is an evaluation of probative value. 1 McCormick on Evidence § 185, at 637 (5th ed. 1999) ("There are two components to relevant evidence: materiality and probative value."). Because the state court judgment against Lee sheds little if any light on whether Boulware committed tax evasion, I would

hold that the district court did not abuse its discretion in ruling the Hawaiian judgment inadmissible. I would affirm the district court and, therefore, respectfully dissent.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

UNITED STATES OF AMERICA,	)	CRIMINAL NO. 99-00239ER
Plaintiff,	)	– VOLUME 5 –
vs.	)	
MICHAEL H. BOULWARE,	)	
Defendant.	)	

TRANSCRIPT OF PROCEEDINGS

The above entitled matter came on for hearing on Friday, July 1, 2005, at 9:11 a.m., at Honolulu, Hawaii

BEFORE: THE HONORABLE
EDWARD RAFEEDIE
United States District Judge

REPORTED BY: STEPHEN B. PLATT, RMR, CRR
Official U.S. District Court Reporter

APPEARANCES: LESLIE E. OSBORNE, JR., ESQ.
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Attorneys for the Defendant

* * *

[160] and not to form or express any opinions or conclusions about this case until it has been submitted to you.

You are excused.

THE CLERK: All rise for the jurors.

(The jury was excused at 1:14 p.m.)

(The following proceedings were held in open court, outside the presence of the jury:)

THE COURT: I can think of no conceivable theory of admissibility for this group of documents labeled Exhibit 2010, because it is a conglomerate of things, including deposition testimony, including copies of checks, including statements of banks, etc.

So the court will – that will not be the last word.

If you file with me a justification to admit this under some pertinent evidentiary rule, I will consider it.

But, as of now, I'm not –

And you're the one that objected to it. You should file whatever objection that you have, other than your – other than that you don't like it.

MR. DWYER: Yes, Your Honor.

THE COURT: That is not a good objection. Which both sides have used.

Now, the other issue:

One other issue, that the government has filed a motion in limine to preclude the introduction of evidence [161] relating to the issues of constructive distribution and return of capital.

This motion would prevent the defendant from arguing that monies diverted from Hawaiian Island to Boulware were actually a return of the defendant's capital investment in the company.

I want to quote to you now from a case, which I will cite in a moment:

"Evidence of unexplained funds in the taxpayer – of the tax – in the hands of the taxpayer establishes a prima facie case of understatement of income, making it incumbent on the taxpayer to overcome the logical inferences drawn from the facts proved," end quote, United States versus Garcia, 412 F.2d, 999, cited with approval by the Ninth Circuit in United States versus Miller, 545 F.2d, 1204.

Once the government had made out a prima facie case, in order for constructive distribution rules to apply, I quote again. This is from Miller.

Quote, "There must be some demonstration on the part of the taxpayer and/or the corporation that such distributions were intended to be such a return," end quote. Miller.

Now, as Miller held, it is not relevant whether the funds could have been classified as return of capital or a dividend at the time they were diverted.

There is a violation given where the diverted funds [162] could have qualified as a return of capital, when the taxpayer fails to report the money as income or record it as a return of capital on the corporate books.

Here, the government has made out the prima facie case required by Miller.

Thus, if the constructive dividend rules are to apply, the defendant must make the requisite showing that the distributions were intended to be a return of capital.

As the government points out, Mr. Manago, who was a witness, who was an employee of the defendant, has testified that there were no returns of capital during the years in question.

Unless the defendant introduces competent evidence that demonstrates otherwise, the constructive distribution rules would apply to this case – would not apply.

Because of the confusing and potentially prejudicial nature of this evidence, the court believes the

matter should be resolved either in a hearing under Federal Rule of Evidence 104, which is to determine the existence of the preliminary facts necessary for admissibility, or if the defendant can make a showing by a written offer of proof, which the court will then consider in determining this issue.

So, what we will do is this:

We will probably hold a hearing.

I'll give you the choice. If you want to present [163] the evidence to the court outside the presence of the jury to demonstrate what I have just said, then I will consider that, and rule accordingly on the issue.

The court cannot rule at this point in time; in other words – for the reasons I have stated.

All right. Now, I think that that is all. We will reconvene on Tuesday, at 9:00 a.m. Try not to blow yourselves up, either.

(Laughter in the court.)

THE CLERK: All rise.

(The hearing in the above-entitled cause was concluded at 1:17 p.m.)

– – –

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

UNITED STATES OF AMERICA,	)	CRIMINAL NO. 99-00239ER
Plaintiff,	)	– VOLUME 8 –
vs.	)	
MICHAEL H. BOULWARE,	)	
Defendant.	)	

TRANSCRIPT OF PROCEEDINGS

The above entitled matter came on for hearing on Monday, July 11, 2005, at 9:07 a.m., at Honolulu, Hawaii

BEFORE: THE HONORABLE
EDWARD RAFEEDIE
United States District Judge

REPORTED BY: STEPHEN B. PLATT, RMR, CRR
Official U.S. District Court
Reporter

APPEARANCES: LESLIE E. OSBORNE, JR., ESQ.
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Attorneys for the Defendant

* * *

[114] Accordingly, the court, without further foundation, will deny the HIE's motion for leave to present evidence of over-reporting of income.

That's subject to reconsideration if a foundation is laid.

The court will now address to the defendant's offer of proof relating to the issue of constructive dividends and returns of capital. Which suffers from the same lack of foundation.

As the court previously explained, the Miller decision, that states that it is not relevant whether the funds could have been classified as a return of capital or a dividend at the time when they were diverted.

There is a violation, even where the diverted funds could have qualified as a return of capital, when the taxpayer fails to properly report the money as income or record it as a return of capital on the corporate books.

That's found at Page 1214 of that decision, 545 F.2d, 1204.

The defendant's offer of proof merely indicates that the defendant would introduce expert testimony

that the funds at issue could have been considered return of capital.

Not only would much of this evidence be excludable as expert legal opinion, it is plainly insufficient under the Miller case.

[115] The defendant must not show merely that the funds could have been a return of capital; he must introduce evidence showing that, at the time of the transfer, the funds were in fact a return of capital.

Based upon the defendant's offer of proof, the court cannot see any benefit in holding any additional hearing on this matter.

The offer of proof fails to satisfy the standard established in the Miller case. In fact, it is expressly contrary to that standard.

And the government's motion in limine to exclude evidence relating to constructive dividends or returns of capital is hereby granted.

Now, this may very well apply to this Hawaii tax adjustment, as well.

But did you wish to be heard on any other issue?

MR. O'CONNOR: Just to clarify, Your Honor.

THE COURT: Yeah?

MR. O'CONNOR: As I understand it, the court is ruling on the over-payment of taxes by the company. Is that correct?

THE COURT: That's right.

MR. O'CONNOR: The court –

THE COURT: Because you filed a motion offering evidence of over-payment –

[116] MR. O'CONNOR: Over-payment.

THE COURT: – of income, and an offer of proof relating to the issue of constructive dividends.

MR. O'CONNOR: A little while ago –

THE COURT: I am ruling on your motion and denying it.

MR. O'CONNOR: Yes, Your Honor.

The question is –

THE COURT: I shouldn't have to explain it.

MR. O'CONNOR: The question is: Can we put on evidence of payment of taxes –

THE COURT: No.

MR. O'CONNOR: – by HIE?

Not over-payment. But the fact that they paid taxes on –

THE COURT: How is that any different than the over-reporting of taxes?

But why is it relevant? It's two different taxpayers. Your client is an individual taxpayer; the corporation is a separate taxpayer.

MR. O'CONNOR: Well, it's relevant –

THE COURT: One ordinarily does not affect the other, unless there's a foundation laid to show that it should.

MR. O'CONNOR: We already have testimony in this

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

UNITED STATES OF AMERICA,	)	CRIMINAL NO. 99-00239ER
Plaintiff,	)	– VOLUME 11 –
vs.	)	
MICHAEL H. BOULWARE,	)	
Defendant.	)	

TRANSCRIPT OF PROCEEDINGS

The above entitled matter came on for hearing on Thursday, July 14, 2005, at 9:05 a.m., at Honolulu, Hawaii

BEFORE: THE HONORABLE
EDWARD RAFEEDIE
United States District Judge

REPORTED BY: STEPHEN B. PLATT, RMR, CRR
Official U.S. District Court
Reporter

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[26] for funds in transit at the beginning and end of the year.

The figure is then adjusted to remove deposits of funds which were not income, and to include income which was never deposited.

This adjusted figure is said to constitute a reconstructed gross income.

Calculation of taxable income then proceeds in the usual way, taking into account the legitimate deduction, exceptions, exclusions and credits.

If the resulting figure differs from what the taxpayer has reported, the government may argue that the difference is unreported taxable income.

Generally, the government must also establish the amount of cash the taxpayer had on hand at the beginning of the year, and exclude this amount. Because some deposits may be the product of the cash the taxpayer already possessed.

However, that is not necessary in this case, because the government did not include any deposits of cash in its analysis.

The state court judgment received into evidence determined that the money that the defendant transferred to his girlfriend, Jin Sook Lee, was not a gift, and remained the property of Hawaiian Isles Enterprises.

That determination is not binding on you.

It may, however, be considered, along with all other [27] evidence, in determining the purpose of the transfer of the money, and whether it constituted unreported income to the defendant.

The evidence from which you are to decide the facts of the case are – consist of the following:

The sworn testimony of any witness, the exhibits which have been received into evidence, and any facts to which all the lawyers have stipulated.

In reaching your verdict, certain things are not evidence, and you may not consider them in deciding what the facts are.

I will list these for you:

Arguments and statements of the lawyers are not evidence. The lawyers are not witnesses. What they have said in their opening statements, closing arguments, and at other times, is intended to help you interpret the evidence, but it is not evidence.

If the facts as you remember them differ from the way the lawyers state them, your memory of them controls.

Now, secondly, questions and objections by lawyers are not evidence.

Attorneys have a duty to their client to object when they believe a question is improper under the rules of evidence.

You should not be influenced by the question, the

* * *

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MICHAEL H. BOULWARE, Defendant-Appellant.	No. 05-10752 D.C. No. CR-99-00239-ER District of Hawaii, Honolulu ORDER (Filed Apr. 22, 2009)

Before: RYMER and THOMAS, Circuit Judges, and LARSON,* District Judge.

The panel has voted to deny the petition for rehearing.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the petition for rehearing en banc is rejected.

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* The Honorable Stephen G. Larson, United States District Judge for the Central District of California, sitting by designation.

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(2)

No. 09-86

In the Supreme Court of the United States

MICHAEL H. BOULWARE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

In *Boulware* v. *United States*, 128 S. Ct. 1168, 1180 (2008), this Court held that 26 U.S.C. 301 and 316, which govern the taxation of distributions by a corporation to a shareholder with respect to its stock, do not require "contemporaneous intent" to treat a corporate distribution as a nontaxable return of capital. The Court remanded to permit the court of appeals to determine whether petitioner's offer of proof on the return-of-capital defense was sufficient under a correct construction of the law. On remand, the court of appeals affirmed petitioner's conviction and sentence.

The questions presented are:

1. Whether the court of appeals correctly determined that petitioner's offer of proof was insufficient to justify the presentation of a "return of capital" theory to the jury because petitioner failed to tender evidence that the distributions were "with respect to * * * stock."

2. Whether the court of appeals exceeded this Court's mandate in concluding that petitioner's proffer was also insufficient for lack of evidence of sufficient stock basis.

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In the Supreme Court of the United States

No. 09-86

MICHAEL H. BOULWARE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-16) is reported at 558 F.3d 971. Prior opinions of the court of appeals (Pet. App. 17-32, 33-73) are reported at 470 F.3d 931 and 384 F.3d 794, respectively.

JURISDICTION

The judgment of the court of appeals was entered on March 9, 2009. A petition for rehearing was denied on April 22, 2009 (Pet. App. 88). The petition for a writ of certiorari was filed on July 20, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Hawaii, petitioner was con-

victed on five counts of filing false tax returns, in violation of 26 U.S.C. 7206(1), four counts of tax evasion, in violation of 26 U.S.C. 7201, and one count of conspiring to make a false statement to a federally insured financial institution, in violation of 18 U.S.C. 371. Pet. App. 33-36. The court of appeals, in a prior appeal, affirmed the conspiracy conviction but reversed the tax convictions and remanded for a new trial. *Id.* at 34-35. This Court denied a petition for a writ of certiorari. 546 U.S. 814 (2005). On remand, petitioner again was found guilty by a jury on the tax counts, and he was sentenced to 36 months of imprisonment on the false return counts and 60 months on the tax evasion and conspiracy counts, to run concurrently. Pet. App. 18-19. On a second appeal, the court of appeals affirmed the convictions and sentence. *Id.* at 17-32.

This Court granted a writ of certiorari, and vacated the court of appeals' decision and remanded for further proceedings. See *Boulware* v. *United States*, 128 S. Ct. 1168, 1182 (2008) (*Boulware I*). The Court held that, contrary to the court of appeals' decision, petitioner did not need to establish contemporaneous intent as an element of his defense theory that the diverted funds were nontaxable as constructive returns of capital under 26 U.S.C. 301 and 316. *Boulware I*, 128 S. Ct. at 1173, 1179-1180. On remand, the court of appeals once again affirmed petitioner's conviction and sentence. Pet. App. 1-16.

1. The Internal Revenue Code (Code) requires "[e]very individual having for the taxable year gross income which equals or exceeds" a statutorily determined amount to file a tax return and pay taxes. 26 U.S.C. 6012(a)(1)(A). Section 61(a) of the Code defines "gross income" as "all income from whatever source de-

rived," a broad definition that includes both lawful and unlawful gains. 26 U.S.C. 61(a); see *James* v. *United States*, 366 U.S. 213, 219 (1961) (plurality opinion); *Rutkin* v. *United States*, 343 U.S. 130, 136-137 (1952).

Section 7201 of the Code makes it a felony to "willfully attempt[] in any manner to evade or defeat any tax imposed by this title." 26 U.S.C. 7201. To support a conviction for income tax evasion, the government must prove the existence of a tax deficiency, an affirmative act of attempted evasion of tax, and willfulness. See *Sansone* v. *United States*, 380 U.S. 343, 351 (1965).

In this case, the existence of a tax deficiency turned on Sections 301 and 316 of the Code, which govern distributions of property "made by a corporation to a shareholder with respect to its stock." 26 U.S.C. 301(a). Section 301(c) divides distributions made with respect to stock into three categories: (1) the portion that is a dividend (as defined by 26 U.S.C. 316) is taxable as ordinary income; (2) any portion that is not a dividend is treated as a return of capital up to the amount of the shareholder's basis in his stock and is nontaxable, but is "applied against and reduce[s]" the shareholder's "adjusted basis of the stock"; and (3) any amount in excess of the shareholder's basis is taxable as a capital gain. 26 U.S.C. 301(c).

Section 316 in turn defines a "dividend" as a distribution of property by a corporation to its shareholders "out of its earnings and profits." 26 U.S.C. 316(a)(2). Section 316(a) further provides, with exceptions not pertinent here, that "every distribution is made out of earnings and profits to the extent thereof." 26 U.S.C. 316(a). Read together, Section 301 and Section 316 establish that, if a corporation makes a distribution of funds to its shareholders "with respect to its stock," the tax conse-

quences of the distribution depend, in part, on whether the corporation has earnings and profits and the amount of the shareholder's adjusted stock basis.

2. Petitioner was the president, founder, and controlling shareholder of Hawaiian Isles Enterprises (HIE), a distributor of tobacco, water, coffee, vending machines, and video games. Pet. App. 18. Following a six-year investigation, the Internal Revenue Service (IRS) determined that petitioner had diverted more than $10 million from HIE and failed to report or pay taxes on that income. The scheme involved a variety of devices, including giving HIE checks to friends and employees and instructing them to cash the checks and return the cash to petitioner; and using false invoices to obtain a loan from a federally insured bank. Petitioner laundered the money through companies in the Kingdom of Tonga and Hong Kong, and used the diverted funds to support a lavish lifestyle, giving millions of dollars in HIE funds to his girlfriend, as well as his wife. *Id.* at 19, 35-39.

In his first trial, petitioner was convicted on five counts of filing a false tax return, in violation of 26 U.S.C. 7206(1); four counts of tax evasion, in violation of 26 U.S.C. 7201; and conspiracy to make a false statement to a federally insured financial institution, in violation of 18 U.S.C. 371. See Pet. App. 34; *Boulware I*, 128 S. Ct. at 1174 n.4. The court of appeals affirmed the conspiracy conviction, but reversed the tax convictions. Pet. App. 33-73.

Petitioner was retried and again convicted on the five counts of filing false tax returns and the four counts of willfully attempting to evade taxes. Pet. App. 19. At trial, the government presented evidence that petitioner diverted more than $10 million from the corporation for

his personal use and failed to report the funds as income on his personal tax returns. In response, petitioner asserted a number of alternative theories in an attempt to show that the diverted funds were nontaxable to him, including that the diversions were nontaxable returns of capital under Sections 301 and 316; that the diversions were actually loans; and that the funds were held in trust for the purchase of his then-wife's stock. *Id.* at 38, 64-66.

During the second trial, the government moved to preclude petitioner from introducing evidence concerning his return-of-capital theory. Pet. App. 4. In response, petitioner presented an offer of proof consisting of (1) evidence that he contended showed that the corporation had overreported its earnings; (2) evidence that petitioner was the controlling shareholder of HIE; and (3) expert testimony to the effect that, if the corporate funds were not loans or advances or if petitioner did not use those funds for corporate purposes, then the funds could be deemed a taxable constructive dividend or a nontaxable constructive return of capital, depending upon whether the corporation had earnings and profits. *Id.* at 20; J.A. at 96-99, *Boulware I*, *supra* (No. 06-1509).

The district court held that petitioner's offer of proof failed to tender sufficient evidence to warrant submitting the return-of-capital theory to the jury. The court concluded that petitioner's proposed expert testimony was inadmissible legal opinion. Pet. App. 4. The court also held that the proffer as a whole was insufficient under *United States* v. *Miller*, 545 F.2d 1204 (9th Cir. 1976), cert. denied, 430 U.S. 930 (1977), because petitioner had not tendered any evidence that the diverted funds were intended, at the time of their disbursement, to be a return of capital. The court accordingly declined

to instruct the jury on petitioner's return-of-capital theory. Pet. App. 4

3. The court of appeals affirmed the convictions and sentence, holding that petitioner's return-of-capital proffer was properly rejected as inadequate under *Miller*. Pet. App. 19-23. The court of appeals therefore did not address whether petitioner's proffer satisfied the other conditions for asserting a nontaxable-return-of-capital defense.

4. This Court granted a writ of certiorari and vacated the court of appeals' decision on the ground that Sections 301 and 316 do not require a defendant to demonstrate contemporaneous intent in order to argue that a distribution should be treated as a return of capital. *Boulware I*, 128 S. Ct. at 1173, 1180.

The Court remanded the case to the court of appeals to permit that court to consider the sufficiency of petitioner's return-of-capital proffer in light of *Boulware I*. 128 S. Ct. at 1180-1182. The Court noted that it agreed with the government's argument that Section 301(a)'s use of the phrase "with respect to . . . stock" imposes "a limiting condition" on the application of that provision, contemplating that "the distribution of property by the corporation be made to a shareholder because of his ownership of its stock" and that "an amount paid by a corporation to a shareholder [be] paid to the shareholder in his capacity as such." *Id.* at 1180 (citations omitted). The Court stated that "[f]acts with a bearing on [that condition] may range from the distribution of stock ownership to conditions of corporate employment (whether, for example, a shareholder's efforts on behalf of a corporation amount to a good reason to treat a payment of property as salary)." *Id.* at 1180-1181 (footnote omitted). The Court accordingly declined to "home in on the

'with respect to . . . stock' condition," stating that "[t]he facts in this case have yet to be raked over with the stock ownership condition in mind, since *Miller* seems to have pretermitted a full consideration of the defensive proffer, and if consideration is to be given to that condition now, the canvas of evidence and Boulware's proffer should be made by a court familiar with the whole evidentiary record."[1] *Ibid.*

5. On remand, the court of appeals, in accordance with the Court's remand order, "conduct[ed] a thorough examination of the record to determine whether or not [petitioner's] offer of proof was sufficient to justify the presentation of a 'return of capital' theory to the jury." Pet. App. 2. After holding that the district court had properly excluded the expert testimony portion of petitioner's proffer as inadmissible legal opinion, *id.* at 7-8, the court of appeals turned to the remainder of petitioner's formal offer of proof—evidence that petitioner was a shareholder and that HIE had overreported earnings, *id.* at 8-9—and held that the proffer was "plainly insufficient to satisfy the elements necessary to assert a return of capital theory," *id.* at 9.

In examining whether there was evidence upon which a jury could rationally find that the diversions were distributions "with respect to * * * stock," as required by

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[1] The Court also noted that Section 301 contained other limiting conditions, including that the diversion of funds be a "distribution"; that the distribution not exceed the recipient's stock basis; and that the corporation have no earnings and profits. *Boulware I*, 128 S. Ct. at 1180 n.12. Citing the government's acknowledgment that although it viewed petitioner's proof as insufficient on these issues as well, it had not raised these grounds for affirmance in its opposition to a writ of certiorari, the Court stated that the government did not dispute these issues. *Ibid.* (citing U.S. Br. at 34 n.11, *Boulware I*, *supra* (No. 06-1509)).

Section 301, the court of appeals explained that "[a] defendant is entitled to an instruction concerning his theory of the case if the theory is legally sound and evidence in the case makes it applicable." Pet. App. 6 (quoting *United States* v. *Morton*, 999 F.2d 435, 437 (9th Cir. 1993)). To show that a distribution was with respect to stock, the court held that "at the very least a taxpayer must tender some evidence of nexus between the corporate distribution and stock ownership," either through affirmative evidence or evidence raising an inference that "there were no other alternative explanations" for the distribution. *Id.* at 13-14. Petitioner's proffer, the court concluded, was devoid of any affirmative evidence suggesting "that any nexus existed between the distribution and [petitioner's] stock ownership." *Id.* at 13. Similarly, petitioner failed to raise a negative inference "that he only could have received the distribution in his capacity as a shareholder," because his proffer did not attempt to exclude other non-shareholder capacities in which he could have received the distribution and, in fact, it "offered evidence and alternative theories that the distribution was a loan or was distributed in trust." *Ibid.*

The court also held that petitioner's proffer was insufficient on the independent ground that it contained no evidence upon which a jury could rationally find, as Section 301(c) requires, "that [petitioner's] basis exceeded the value of the distribution[s]." Pet. App. 14. Noting that petitioner's "offer of proof did not, on its face, purport to tender evidence on this element," the court "look[ed] to the entire record to ascertain whether there was sufficient evidence to make a threshold showing." *Id.* at 14-15. Examining the transactions that petitioner asserted created basis in his stock, the court concluded

that "[f]rom all of this evidence a jury could conclude that [petitioner] was a shareholder with a stock basis, but the evidence tendered was insufficient to meet the threshold requirement that he have a stock basis in excess of [the] $10 million" in diverted funds. *Id.* at 15.

ARGUMENT

Petitioner seeks review of the court of appeals' determination that petitioner failed to tender evidence supporting the elements of his return-of-capital theory. The court of appeals' conclusion—reached after performing the review of "the whole evidentiary record" that this Court contemplated in remanding the case, *Boulware I*, 128 S. Ct. at 1181—is correct, and petitioner's fact-bound challenge does not merit further review.

1. a. Petitioner first contends (Pet. 10-13) that the court of appeals erroneously imposed an excessive burden on petitioner in determining that his proffer contained insufficient evidence that the distributions were "with respect to * * * stock." Petitioner acknowledges (Pet. 10), however, that he bears the burden of production—of "tender[ing] some evidence," Pet. App. 13-14—with respect to his theory that HIE's distributions were constructive returns of capital. Petitioner also acknowledges (Pet. 11) that the court of appeals articulated the correct legal standard for analyzing the sufficiency of his evidentiary proffer, stating that "a defendant is entitled to an instruction concerning his theory of the case if the theory is legally sound and evidence in the case makes it applicable, even if the evidence is weak, insufficient, inconsistent, or of doubtful credibility." Pet. App. 6 (quoting *United States* v. *Kayser*, 488 F.3d 1070, 1076 (9th Cir. 2007)).

Petitioner's contention (Pet. 10-12) that the court actually held him "to a far more stringent burden," requiring him to "'establish' the fact that the jury would be asked to determine," is thus in essence an argument that the court erred in concluding that petitioner had not proffered sufficient evidence that the distributions were with respect to stock. That fact-bound contention does not merit this Court's review.

In *Boulware I*, this Court stated that a distribution may satisfy Section 301(a)'s requirement that the distribution be "with respect to . . . stock" if it is "made to a shareholder because of his ownership of its stock," or is "paid to the shareholder in his capacity as such." 128 S. Ct. at 1180. The court of appeals accordingly required petitioner to tender some evidence of a "nexus between the corporate distribution and stock ownership," Pet. App. 14, either through "affirmative evidence" or "negative inference," *id.* at 13.

Petitioner contends (Pet. 12-13) that a jury could have inferred this nexus because petitioner owned 50% of HIE's stock; he already "drew a substantial salary from HIE for his service as president and chairman," Pet. 13; and "the record evidence [does not] compel a finding that [the] distributions" were received as loans or repayments, rather than in a shareholder capacity, *ibid.* But as the court of appeals correctly concluded, petitioner's proffer did not contain any affirmative evidence that there was any connection or nexus between the distributions and petitioner's stock ownership. The mere fact that petitioner was a shareholder of HIE does not establish such a nexus with respect to the specific transactions at issue, given that a shareholder can receive funds in a non-shareholder capacity, for instance, as the recipient of a loan. Pet. App. 13. Nor can peti-

tioner rely on a negative inference that he did not receive the funds in a non-shareholder capacity, because his proffer did not attempt to exclude all such scenarios, and in fact it presented evidence that petitioner did receive the diverted funds in a non-shareholder capacity, *i.e.*, as loans or in trust for the purchase of his then-wife's stock. *Id.* at 14 n.7. The court of appeals therefore correctly held that petitioner did not proffer sufficient evidence of his return-of-capital theory to submit it to the jury.

b. Petitioner next contends (Pet. 13-17) that the court of appeals' requirement of some evidence of a nexus between the distribution and the stockholder's stock ownership creates "tax limbo," and conflicts with the treatment of the "with respect to * * * stock" condition in civil tax cases. Neither argument is correct.

First, petitioner asserts (Pet. 16) that the court of appeals' decision relegates the distributions at issue to "tax limbo," because the diverted funds are neither subject to Sections 301 and 316, nor subject to any other provision of the Code. Petitioner is correct that the purpose of Section 301(a)'s requirement that a distribution be "with respect to * * * stock" is to distinguish between distributions made to a shareholder because of his stock ownership, and those made to a shareholder in his non-shareholder capacity; and that if a distribution is not made "with respect to * * * stock," then other provisions, not Sections 301 and 316, govern its tax treatment. But the fact that petitioner was unable to present sufficient evidence that the funds should be subject to Sections 301 and 316, and was also unable to prove at trial that the funds were nontaxable under any other provision (for instance, as a loan or a trust distribution), does not suggest that the diversions fall into some unde-

fined category. Rather, it simply reflects the fact that petitioner received the funds as an embezzler, and embezzled funds that do not fall within any other provision are properly taxable as income under the general definition of income in Section 61(a). See *James* v. *United States*, 366 U.S. 213, 219 (1961) (plurality opinion).

Second, petitioner contends (Pet. 17) that the court of appeals' conclusion that his proffer was insufficient is inconsistent with civil cases wherein, he asserts, "courts simply infer (usually without comment) that a controlling shareholder receives the distribution because of his stock ownership in the absence of affirmative evidence that he received it in some other, nonshareholder capacity." But the decisions that petitioner cites (Pet. App. 17 n.5) did not comment on the "with respect to * * * stock" requirement because in each case, the court was engaged in deferential review of either the IRS's administrative determination or a jury's verdict that a corporate distribution was taxable as a constructive dividend, and the taxpayers did not challenge the determinations under review on the ground that the distributions were not "with respect to * * * stock."[2] The fact that these

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[2] See *Neonatology Assocs., P.A.* v. *Commissioner*, 299 F.3d 221, 231-232 (3d Cir. 2002) (taxpayer claimed distributions were deductible expenses); *Pittman* v. *Commissioner*, 100 F.3d 1308, 1313-1314 (7th Cir. 1996) (taxpayer argued that he did not personally benefit from distribution); *Crowley* v. *Commissioner*, 962 F.2d 1077, 1080 (1st Cir. 1992) (taxpayers claimed distributions were loans); *Green* v. *United States*, 460 F.2d 412, 419-421 (5th Cir. 1972) (taxpayer claimed distributions were not dividends because the funds went to his children); *King's Court Mobile Home Park* v. *Commissioner*, 98 T.C. 511, 514-515 (1992) (taxpayer claimed distributions were deductible wages); *Federbush* v. *Commissioner*, 34 T.C. 740, 749-751 (1960) (taxpayer claimed distributions were deductible loss expenses), aff'd, 325 F.2d 1 (2d Cir. 1963) (per curiam).

decisions addressed only the specific arguments raised by the taxpayers cannot be taken as implicitly holding that a distribution can be assumed to be with respect to stock in the absence of any evidence. Notably, petitioner cites no case in which the "with respect to * * * stock" issue was actually contested and the court refused to require a nexus between the distribution and stock ownership, or suggested that no such "*express* evidence" (Pet. 16) was necessary.[3]

2. Petitioner next challenges (Pet. 18) the court of appeals' conclusion that petitioner's failure to tender proof of sufficient stock basis "provid[ed] an additional justification for the trial court to preclude [petitioner] from presenting a return of capital theory," Pet. App. 14-15, because, in his view, examination of that issue exceeded the scope of this Court's remand. Further review of this question is unwarranted, both because the court of appeals' ruling on the "with respect to * * * stock" element of petitioner's proffer is sufficient to support the judgment, and because the court's fact-specific stock-basis ruling is correct.

Boulware I did not bar the court of appeals from considering on remand whether petitioner had proffered evidence of sufficient stock basis. In its brief before this Court in *Boulware I*, the government stated that petitioner's proffer was insufficient as to the stock-basis element, but acknowledged that it had not raised that

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[3] Contrary to petitioner's argument (Pet. 17 n.6), the Tax Court's approval of the Commissioner's fact-specific conclusion that certain distributions made by HIE to pay petitioner's legal expenses—distributions that are not at issue in this case—were "with respect to * * * stock" does not suggest that the Tax Court applied a different standard to the Section 301 inquiry in that case. See *HIE Holdings, Inc.* v. *Commissioner*, 97 T.C.M. (CCH) 1672, 1745 (2009).

issue in its opposition to the petition for a writ of certiorari or in its briefing before the court of appeals, except in opposition to petitioner's petition for rehearing. Pet. 6 n.2 (quoting brief). Citing that acknowledgment, the Court noted that the government did not "dispute that [petitioner] offered sufficient evidence of his basis and HIE's lack of earnings and profits." *Boulware I*, 128 S. Ct. at 1180 n.12.

The Court's recognition that the government did not urge the stock-basis point as an additional ground for affirmance in *Boulware I* did not purport to limit the issues that the court of appeals could consider in conducting the full record review that the Court contemplated on remand. See 128 S. Ct. at 1180 n.12; *id.* at 1180-1181. As a result, the question whether to address the stock-basis issue, even though the government did not raise it before the rehearing stage or rely on it before this Court in *Boulware I*, was a matter for the court of appeals' discretion. See Pet. App. 15 n.9; cf. *United States Nat'l Bank* v. *Independent Ins. Agents of Am., Inc.*, 508 U.S. 439, 447-448 (1993) (court of appeals has discretion to consider issues notwithstanding waiver). The court did not abuse that discretion, particularly in view of the fact that *Miller* "pretermitted a full consideration of the defensive proffer" not only as to the "with respect to * * * stock" element, but also the stock-basis element. *Boulware I*, 128 S. Ct. at 1181.

Contrary to petitioner's argument (Pet. 19), it was not unfair for the court of appeals to consider the stock-basis issue without allowing petitioner to supplement his formal proffer. As the court of appeals noted, the focus of the arguments before the district court on *Miller*'s intent requirement did not relieve petitioner of his burden of tendering evidence with respect to each element

of the return-of-capital defense in his proffer to the district court. Pet. App. 13 n.5; *United States* v. *Dorrell*, 758 F.2d 427, 430 (9th Cir. 1985). After examining not only petitioner's formal proffer, but all of the transactions that petitioner asserts created basis in his stock, the court of appeals correctly determined that the "evidence tendered was insufficient to meet the threshold requirement that he have a stock basis in excess of $10 million." Pet. App. 15. That fact-bound conclusion does not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In The

Supreme Court of the United States

MICHAEL H. BOULWARE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

The government describes Boulware's petition as "fact-bound,"[1] and in some respects it does turn on the particulars of the record below. But this misses the broader point. The Ninth Circuit ignored settled law and exceeded this Court's mandate to sustain the result reached in its prior decision, which this Court had unanimously vacated. If the courts of appeals can insulate their disregard of this Court's decisions through a one-sided reading of the record, then those decisions will lose much of their force.

1. The government cannot cite a single case--civil or criminal--from any court that has imposed the burden that the court of appeals placed on Boulware to meet the "with respect to its stock" requirement. No court has required more evidence on that point than Boulware presented. No court has required "affirmative evidence" of a nexus between stock ownership and the distribution, beyond the evidence that Boulware presented--50% stock ownership, control of the corporation, and evidence (Boulware's tax returns) that he did not treat the distributions as salary. No court has required evidence "excluding all [non-shareholder] scenarios," as the court of appeals did here. Opp. 11. The Ninth Circuit created a brand-new rule that

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[1] Brief for the United States in Opposition at 9 (filed Oct. 21, 2009) ["Opp."]. Boulware's petition will be cited as "Pet."

substantially alters the taxation of distributions to controlling shareholders.

2. The government tries to explain away the dozens of cases that apply the constructive dividend rules without requiring more evidence on the "with respect to its stock" issue than Boulware presented. It argues that those courts were engaged in "deferential review of either the IRS' administrative determination or a jury's verdict." Opp. 12. But the "deferential review" courts afford administrative decisions and jury verdicts closely resembles the "generous" standard that controls a criminal defendant's entitlement to a jury instruction on his defense. App. 6. The Ninth Circuit paid lip service to that standard, but it actually held Boulware to a far more stringent burden, contrary to cases from this Court and the other courts of appeals. Pet. 10-13.

The government also notes that in none of the previous cases applying 26 U.S.C. §§ 301 and 316 did the party opposing constructive distribution treatment challenge the evidence on the "with respect to its stock" issue. Opp. 12-13. The government suggests, in other words, that the lawyers who handled those many cases--including some government lawyers--simply missed a good argument, which government counsel here spotted (albeit not until the government opposed Boulware's petition for rehearing in the court of appeals). It seems far more likely, however, that the lawyers in those previous cases recognized the obvious: that the "with respect to its stock" requirement is readily satisfied by

precisely the kind of evidence Boulware presented here.

3. Boulware noted in his petition that the "with respect to its stock" limitation establishes a binary structure, by which corporate distributions to controlling shareholders either fall under the constructive distribution rules of §§ 301 and 316 or under the various rules that govern distributions in a nonshareholder capacity. Pet. 14-16. The government insists that the Ninth Circuit's approach leaves this structure intact (and does not create a forbidden "tax limbo") because Boulware received the funds in his capacity as an "embezzler" and the distributions are thus taxable as ordinary income under 26 U.S.C. § 61(a). Opp. 11-12.

The Tax Court rejected a closely analogous effort to invoke § 61(a) in *Truesdell v. Commissioner*, 89 T.C. 1280, 1296-99 (1987), and no court since has tried to resurrect it. Indeed, at least since *Truesdell*, no court has considered "embezzler" to be one of the nonshareholder capacities in which a controlling shareholder can receive a corporate distribution. The nonshareholder capacities to which the cases, the relevant Treasury regulation,[2] and the legislative history[3] refer are *legal* capacities--the

[2] *See* 26 C.F.R. § 1.301-1(c) ("Section 301 is not applicable to an amount paid by a corporation to a shareholder unless the amount is paid to the shareholder in his capacity as such.").

[3] S. Rep. 1622, 83d Cong., 2d Sess. 231 (1954) ("Subsection (a) accordingly makes clear that section 301 has applicability only to distributions of property to shareholders in their capacity as such. For example, a distribution of property to a shareholder who is a creditor of the corporation in satisfaction of his claim against the corporation is not within the scope of section 301.").

other legal relationships (*e.g.*, employer-employee, creditor-borrower) through which a shareholder can receive funds from his corporation. The government cites no case that treats money that a controlling shareholder such as Boulware obtains through alleged embezzlement as having been received in a nonshareholder capacity.[4] Instead, when a controlling shareholder diverts funds from his corporation, courts apply the taxation rules in § 301(c), regardless of whether the transaction could be characterized under state law as an offense against the corporation. *See, e.g., Drybrough v. Commissioner*, 238 F.2d 735, 738 (6th Cir. 1956); *Estate of Sell v. Commissioner*, T.C. Memo 1992-130, 1992 Tax Ct. Memo LEXIS 455, at *38-*48.

Notably, the government's position here flatly contradicts its position in a series of civil tax cases. In those cases, the IRS has argued successfully that the controlling shareholder of a close corporation *cannot* embezzle from his own corporation. *See, e.g., Stark v. Commissioner*, T.C. Memo 1999-1, 1999 Tax Ct. Memo LEXIS 2, at *12-*13; *Frankland Racing Equipment, Inc. v. Commissioner*, T.C. Memo 1987-210, 1987 Tax Ct. Memo LEXIS 206, at *69; *M.J. Laputka and Sons, Inc. v. Commissioner*, T.C. Memo 1981-730, 1981 Tax Ct. Memo LEXIS 10, at *30; *Federbush v. Commissioner*, 34 T.C. 740, 750-51 (1960), *aff'd*, 325 F.2d 1 (2d Cir. 1963) (per curiam).

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[4] The sole case the government cites on this point--*James v. United States*, 366 U.S. 213 (1961)--did not involve distributions by a corporation to a controlling shareholder, nor did it interpret §§ 301 and 316.

In each of these cases, the corporate taxpayer claimed a deduction for a theft loss under 26 U.S.C. § 165 based on a controlling shareholder's diversion of funds from the corporation, and the IRS opposed the deduction. In *Frankland Racing Equipment*, for example, the IRS argued that "no embezzlement occurred where a dominate [sic] shareholder misappropriates corporate monies as the requisite intent to embezzle is absent." 1987 Tax Ct. Memo LEXIS 206, at *69. The Tax Court agreed. It found that Frankland (the controlling shareholder) "had no intent to embezzle from Frankland Racing as his objective was to conceal the financial performance of the corporation from [his wife] and to evade tax. The funds diverted pursuant to the scheme are accurately classified as constructive dividends." *Id.*

In *M.J. Laputka and Sons*, the Tax Court agreed with the IRS' argument that "inasmuch as the shareholders who misappropriated the money also dominated the corporation, it would be anomalous to say that there was the requisite intent to embezzle. They would be taking money from themselves, and this does not constitute embezzlement." 1981 Tax Ct. Memo LEXIS 10, at *30. The court concluded: "The money diverted by [the controlling shareholders] and used by them for their personal benefit is more accurately described as disguised dividends to them." *Id.* at *31. Having argued successfully in these and other cases that a controlling shareholder cannot embezzle from his own corporation, the government should not be

permitted to take a contrary position here merely to insulate the court of appeals' decision from review.[5]

4. In addition to contradicting the government's position in prior cases, the "embezzler" theory has a second flaw. Even if a controlling shareholder can embezzle from his own company, and even if that embezzlement bears upon a return of capital claim, in a criminal case such as this the Sixth Amendment requires that the defendant's embezzlement be determined by the jury. In its last appearance before the Court, the government made the same "embezzler" argument. Although the Court "decline[d] to address whether an unlawful diversion may ever be deemed a 'distribution . . . with respect to [a corporation's] stock,'" it rejected the government's contention that the jury had already found that Boulware embezzled from HIE. The Court declared: "[T]he jury was not asked, and cannot be said to have answered, whether Boulware breached any fiduciary duty as a controlling shareholder, unlawfully diverted corporate funds to defraud his wife, or embezzled HIE's funds outright." *Boulware v. United States*, 128 S. Ct. 1168, 1181 (2008). The government still lacks a jury determination on the embezzlement theory, and it cannot use that theory here to justify the Ninth Circuit's decision on remand.

5. The government insists that the Ninth Circuit had the "discretion" to consider the basis

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[5] Of course, if the government's embezzlement theory were correct, then HIE--the corporation from which Boulware allegedly embezzled--would be entitled to a theft deduction under § 165 for the years in question.

issue that the government forfeited below and did not dispute in this Court. Opp. 14. But the government's appeal to "discretion" masks the shell game it has played. In the district court and before the Ninth Circuit panel, it relied exclusively on the "contemporaneous intent" requirement from *United States v. Miller*, 545 F.2d 1204 (9th Cir. 1976). At the petition for rehearing stage, the government introduced the "with respect to its stock" and basis issues--neither of which it had previously urged. Before this Court, the government abandoned contemporaneous intent and basis and focused on "with respect to its stock." On remand, the government argued "with respect to its stock" and reintroduced basis. The court of appeals has allowed the government to get away with this shape-shifting while holding Boulware strictly to the record he made in the district court, where the sole contested issue was the *Miller* contemporaneous intent standard. *E.g.*, App. 13 n.5, 15 n.9. That double standard is profoundly unfair.

Apart from the unfairness of the Ninth Circuit's approach on remand, its consideration of the basis issue plainly exceeded the scope of this Court's remand. Fairly read, the remand left two issues open: whether Boulware had presented enough evidence on the "with respect to its stock" issue to obtain a return of capital instruction, and whether embezzlement by a controlling shareholder from his corporation can preclude application of §§ 301 and 316. *See* 128 S. Ct. at 1180-82. Nothing in the Court's opinion suggests that it intended the court of appeals to resurrect an issue--basis--that the government had not raised in the district court, had

not raised before the court of appeals panel, and did not dispute in this Court.

6. The government ignores a further point, noted at Pet. 19 n.7: contrary to the court of appeals' decision (App. 15), it was not necessary for Boulware to offer evidence of "a stock basis in excess of $10 million" to present the return of capital defense. The jury never found that Boulware diverted that amount of money; it merely found an *unquantified* tax deficiency or understatement of income for each year and count in question. The alleged $10 million diversion consisted of money in varying amounts from varying sources received over a period of years. Boulware's alternative defenses (other than return of capital) varied from one sum to another; the jury may have credited some defenses for some amounts of money and disbelieved others.

The court of appeals acknowledged that Boulware presented evidence of millions of dollars in basis. App. 15. Even if that evidence fell short of the full $10 million at issue, it sufficed to meet Boulware's burden of production under the "generous" standard for obtaining a defense instruction.

CONCLUSION

For the foregoing reasons, and for the reasons stated in Boulware's petition, the petition for a writ of certiorari should be granted.

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